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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

No. ________

WAGNER D. JACKSON, JR., PETITIONER
v.
THE RIGHT STUFF, et al.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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158pp

QUESTIONS PRESENTED[1]

Is the Third Circuit decision contrary to binding precedent in that increases plaintiff's burden in racial discrimination cases in a manner that would eviscerate the entire rationale supporting present law ?

Is the Third Circuit decision contrary to binding precedent in that it allows district courts to dismiss cases on summary judgment by making critical findings of fact contradicted by both parties and derived entirely from the imagination of the district court ?

Is the Third Circuit decision contrary to binding precedent in that it allows district courts to enter a final decision on the merits, transfer the file to the appellate court, relinquish jurisdiction over the case, wait until a week before appellant's brief on the merits is due, and then impose a $90,000.00 punitive sanction on the appellant which the district court admits it cannot legally impose without continuing jurisdiction ?

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[1] Petitioner has simultaneously filed two separate petitions arising from the same case. The questions presented in the companion petition for a writ of prohibition or mandamus are (1) whether the district court committed judicial misconduct by making personal threats against petitioner, (2) whether the district court committed judicial misconduct by carrying out those personal threats, and (3) whether the appellate court committed judicial misconduct by refusing to perform appellate review.

PARTIES TO THE PROCEEDING

Petitioner is Wagner D. Jackson, Jr., *pro se*.

Respondents are The Right Stuff, Inc., Dawne Touchings, and Paula Krongard.

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PETITION FOR A WRIT OF CERTIORARI

Wagner D. Jackson, Jr., petitioner *pro se*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals and the district court are attached. Appendix ("App."), *infra*, 1-22.

JURISDICTION

The judgment of the court of appeals was entered on 28 January 1999. App., *infra*, 1-5. A petition for rehearing was denied on 17 March 1999. App., *infra*, 6. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY LAW

The Fifth Amendment to the United States Constitution provides: "No person shall be ... deprived of life, liberty, or property, without due process of law ..."

42 U.S.C. §1981 provides: "All persons within the jurisdiction of the United States shall have the same right ... to make and enforce contracts ... and the term 'make and enforce contracts' includes ... the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship, [and] [t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

42 U.S.C. §2000a et seq. provides: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."

The New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, *et seq* provides: "The Legislature finds and declares that practices of discrimination ... because of race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation ... or nationality, are matters of concern to the government of the State, and that such discrimination ... menaces the institutions and foundation of a free democratic State ... The Legislature further finds that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm. The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption;

and adjustment problems, which particularly impact on those protected by this act. Such harms have, under the common law, given rise to legal remedies, including compensatory and punitive damages. The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed ..."

STATEMENT

In September 1994, petitioner joined a commercial dating service called "The Right Stuff," which accepts as clients graduates and faculty members of the most academically selective colleges and universities in the United States. Petitioner was eligible for membership by virtue of being a graduate of Harvard College and Yale Law School. The Right Stuff was then owned by Dawne Touchings and a now departed business partner. It was operated through a post office box in Upper Montclair, N.J., serving clients all over the United States. App., *infra*, 23-24, 35-38.

In March 1995, petitioner dated a The Right Stuff client named Dorothy Miller. Petitioner is a Native American/African American man and Miller is a white female. At the end of April, following a brief argument with Miller, petitioner sent her two e-mails accusing her of racial discrimination and lying. Miller complained to The Right Stuff and immediately thereafter this business organization refused, without explanation, to continue doing business with petitioner. App., *infra*, 39-41.

In May 1995, after petitioner exerted a great deal of effort to get The Right Stuff to respond to his telephone calls and other communication, Dawne Touchings told petitioner that she had halted business service pursuant to The Right Stuff's "three strikes" policy of refusing service following the complaints of three other clients. She said that before Miller's complaint --- months before as it turns out --- another client had complained because petitioner called her at work after getting no answer at the offered home telephone number. Petitioner responded (1) that this "three strikes" policy is not mentioned in The Right Stuff's material, so petitioner could hardly be out of compliance with an unannounced rule, (2) that even Touchings claimed only two strikes, and (3) that her decision to refuse to do business with petitioner was more likely an act of racial discrimination in response to Miller's complaint that a person of color had criticized her behavior. Touchings was obviously shaken by this retort and changed her explanation for ending business service, claiming that she had stopped petitioner's service due to possible failure to make timely payment of dues and fees. App., *infra*, 41-46.

In June 1995, litigation began in the New Jersey Department of Public Safety/Division of Civil Rights("DCR"). In September 1995, DCR filed a complaint on behalf of petitioner, but DCR would not arrange for oral depositions. In June 1996, petitioner transferred the case to the New Jersey Office of Administrative Law ("OAL"), but OAL also refused to allow oral depositions. In February 1997, petitioner filed discrimination claims in the district court in under 42 U.S.C. §1981, 42 U.S.C. §2000a, and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.*

During litigation Touchings admitted (1) that no termination policy of any kind was announced to the members, app., *infra*, 24-26, (2) that the "three" in "three strikes" is meaningless as The Right Stuff refuses to do business after whatever number of strikes seems appropriate to them at the time, perhaps using three as the maximum, app., *infra*, 47, and (3) that petitioner never had any unpaid dues or fees. App., *infra*, 26. So the "unpaid dues and fees" excuse was dumped, and the original "three strikes" explanation was replaced with version 2.0 in which the number three is essentially meaningless.

In June 1997, Touchings fatally damaged whatever was left of her revised three strikes excuse by admitting during her deposition that after refusing to do business with petitioner she and her former co-owner agreed to do business with a man reported to have raped a female client.

Touchings testified during her deposition that the three strikes policy reflects her unwillingness and inability to determine the truthfulness of any particular report of customer misconduct:

> It is difficult in some cases like this to determine whether the woman started the argument or the guy started the argument. When you are put in that situation it is very difficult to be a judge of something that you didn't see and had no involvement with. So we felt that for situations like that a three strikes policy was reasonable because we viewed it in the sense of not having to judge the person's appropriateness but we also felt there would be some types of behavior that would be so inappropriate to the service that they [we?] wouldn't wait for the three strikes because that would be burdensome to our members.

App., *infra*, 26-27. She testified that she simply adds up complaints against an individual and eventually refuses to do business with that person:

> It was just that if somebody's behavior was so inappropriate that he managed to offend three different people then there was something wrong and he wasn't meant for that kind of service.

App., *infra*, 27; *See also* App., *infra*, 27-28.

But when petitioner's cross-examination revealed that she accepted a rapist as a client of her dating service, Touchings first argued that the rape was irrelevant because she and her former co-owner did not know whether to believe the female client's report. Petitioner then reminded Touchings that earlier in the deposition she described her "three strikes" policy (version 2.0) as including no credibility review for customer complaints. Touchings then changed her argument and claimed that the rape was irrelevant because it occurred before the rapist became a customer of the dating service. Indeed, The Right Stuff did not even give the rapist one "strike" for the rape under their "three strikes" policy:

> A. We let him in the service.
>
> Q. Even though he had been accused of date rape you decided that?
>
> A. Yes.
>
> Q. Did you decide that the date rape didn't occur or simply that there was more of a relationship beforehand than she had said?
>
> A. Yes, that she had misrepresented the relationship and he had indicated that she was being very vindictive towards him.
>
> Q. Did you come to the conclusion that the date rape didn't occur or just that it happened after six months rather than after three days?
>
> A. We didn't come to any conclusion about whether it occurred or whether it hadn't occurred.
>
> Q. Did you count that as a strike?
>
> A. No, because it wasn't while this person was a member.
>
> Q. So an accusation of date rape didn't even merit a strike?
>
> A. We don't know whether it occurred so how can we do that?

> Q. You told me earlier that you count things as strikes whether you believe the allegation or not.
>
> A. He wasn't a member of the service.
>
> Q. Didn't you tell me earlier that you count accusations as strikes whether you believe the accusation or not?
>
> A. As long as the person is a member of our service, yes.
>
> Q. But behavior which took place before the person is a member doesn't count as a strike just because the person wasn't a member at the time?
>
> A. If it can't be substantiated.
>
> Q. You have told me that you don't really care about the substantiation, you don't care whether it is true or not?
>
> A. If a person is not a member and there is nothing to indicate that what this person is saying is true.
>
> Q. You told me that could generally be the case, that you would count it as a strike.
>
> A. You [we?] count it as a strike when it involves members. We don't want to be put in the position of having to decide which version of a member's story is correct. In this case the person was not part of our service, we were not involved in the incident when it occurred, there was nothing in what was given to us to indicate that it had or it had not occurred.

App., *infra*, 29-30.

Petitioner then made the obvious point that a rapist is a threat to the clients of a dating service whether the rape occurred before or after the rapist became a customer.

Touchings then illogically bounced back to her original argument that they were not sure that they could believe the rape victim:

Q. I guess I don't see why the non-membership has any logical relationship to whether the thing counts as a strike or not. You say you count
it as a strike if a person is a member and there is a complaint whether you believe the complaint or not, is that correct?

A. Yes.

Q. Why did it matter that the person wasn't a member at the time he was accused of date rape? Why do you care about that? Why wouldn't that count as a strike whether he was a member or not? Isn't he still just as much of a danger to the other members of the group?

A. It was not clear that any of this occurred.

Q. But you just said it is never clear that any of it occurred, you count it as a strike whether you believe it or not. That's true in every instance,
is it not?

A. As it pertains to members, yes.

App., *infra*, 30.[1]

After all this credibility damage, sometime between June 1997 and January 1998, Touchings and her attorneys made a strategic decision to dump the "three strikes" explanation and replace it with the new "endangering the clients" explanation, even though Touchings had committed herself in sworn deposition testimony to "three strikes" (version 2.0).[2] In November 1997, defense counsel initially included criminal anti-stalking statutes in their pretrial brief exhibits, even though no one has even alleged that petitioner ever stalked anyone. Apparently, defense counsel just got carried away and made up this "stalking" element of the "endangering the clients" defense without first creating any support whatsoever in the factual record. They later removed these exhibits from the pretrial brief. But the new defense surfaced again when The Right Stuff's January 1998 summary judgment brief accused petitioner of having "a stalking obsession." App., *infra*, 48. More importantly, defense counsel had Touchings prepare an affidavit in January 1998 to go along with the motion and "replace" her June 1997 deposition testimony:

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[1] Petitioner was prohibited from learning the names of the rapist and the rape victim and was also prohibited from taking discovery from these individuals by the district court's 7 July 1997 order prohibiting petitioner from obtaining any further discovery from "current or former members of The Right Stuff." App., *infra*, 65-66.

> Given plaintiff's poor judgment, his inappropriate behavior toward other Right Stuff members, and his failure to recognize the inappropriateness of his behavior, I was greatly concerned that plaintiff's behavior would continue and potentially endanger the well-being of my members, as well as the goodwill of The Right Stuff.

App., *infra*, 49-50 (emphasis added).

Indeed, note that Touchings and her attorneys decided to dump not just "three strikes" in particular, but the whole idea that she acted in accordance with any termination policy --- none is mentioned in the affidavit --- opting instead to defend an *ad hoc* decision that petitioner was dangerous to the clients. This new story saved respondents from having to explain the absence of any termination policy statement in the materials sent to the members and from having to rationalize Touchings' decisions regarding other complaints. From this point on, Touchings claimed to have treated her refusal to do business with petitioner as special case that need not be justified by any stated policy or and need not be consistent with any other decisions.

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[2] Aside from contradicting herself on the primary element of her alleged "three strikes" policy, *i.e.*, the absence of any credibility evaluation of client complaints, note that Touchings' desire to avoid passing judgment on her clients should be one more reason for accepting the word of the client rape victim over the non-client rapist, instead she did just the opposite.

Next, sometime between January 1998 and September 1998, The Right Stuff decided to abandon the factually unsupportable (and blatantly racist) "endangering the clients" defense.[3] Respondents' 2 September 1998 Third Circuit brief says The Right Stuff refused to do business with petitioner due to "[petitioner's] refusal to follow its rules, [petitioner's] offensive overreaction to others member's rejection of [petitioner], and [petitioner's] failure to recognize the impropriety of [his] conduct." App., *infra*, 51. There is nothing in the entire brief about Touchings' sworn statements on "endangering clients" or a "three strikes" policy.[4]

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[3] The "endangering the clients" defense is itself evidence of racial animus as petitioner has absolutely no history of criminal behavior and respondents do not even bother to assert otherwise. They believe this claim to be credible simply because of petitioner's ethnicity, or petitioner's ethnicity and gender.

[4] Since this story number five was created on appeal and the Third Circuit refused to perform appellate review, no court has addressed this element of Touchings' pattern of perjury.

This juggling act leaves Touchings with a severe problem in that by renouncing sworn testimony --- not once, but twice --- on the core fact issue in the case, she has committed calculated serial perjury in violation of 18 U.S.C. §1621. Moreover, this sequential adoption and rejection of defenses is not Touchings' only false testimony. Indeed, it is not even the only matter on which she has given sworn statements that contradict each other.[5]

In a 16 page opinion, app., *infra*, 7-22,[6] discussing virtually nothing but contested material facts, the district court resolved all conflicts so as to allow summary judgment in favor of The Right Stuff. Additionally, in a subsequent opinion on attorneys fees, app., *infra*, 86-96, the district court ordered petitioner to pay about $30,000.00 to respondents and about $60,000.00 to defense counsel. App., *infra, 55.* In the attorneys fees opinion, Judge John Lifland displayed a complete loss of dispassionate evenhandedness by finding that petitioner's claims were not only invalid but frivolous, and not only frivolous but made in objective bad faith, and not only in objective bad faith but in subjective bad faith, and not only in subjective bad faith under a standard appropriate for lawyers but in subjective bad faith under a forgiving standard appropriate for *pro se* litigants. App., *infra*, 87-95.

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[5] Touchings also asserted during her deposition first the story that two different clients (Haan and Miller) terminated their memberships due to their interaction with petitioner. Later in the deposition Touchings asserted the contradictory story that Haan alone terminated for this reason, after petitioner presented her with contradictory statements in documents she and her counsel had filed earlier in the litigation. App., *infra*, 30-33. In her "corrective" affidavit of January 1998 she goes back to the first story, *i.e.*, that both women dropped out because of petitioner. App., *infra*, 49-50. Actually, neither event can be blamed on petitioner. Miller is unsure why she dropped out and Haan dropped out over a month before petitioner contacted her at work. This is especially contemptuous disregard for the law against perjury because Miller testified during her deposition that she does not know why she terminated her membership and Touchings attended every minute of Miller's deposition. App., *infra*, 34.

[6] All references to document page lengths are based on the original documents on 8.5 x 11 paper, not the documents as they appear in the appendix.

The Third Circuit's five page unpublished memorandum opinion, app., *infra,* 1-5, affirms the district court without mentioning a single case or a single statute or any particular legal or factual dispute.[7] Judge Richard Nygaard's opinion just lists petitioner's questions presented and complains about the linguistic tone of petitioner's briefs, completely ignoring the lower court's violations of binding precedent, manifestations of judicial bias, and acts of judicial misconduct.[8] *See infra* 16-25 (violations of binding precedent); *See also* Petition For Writ Of Prohibition Or Mandamus (judicial bias and judicial misconduct) at 3-18.

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[7] Not surprisingly, neither does the one sentence refusal to rehear the case *en banc*. App., *infra*, 6.

[8] Petitioner's main response to the linguistic tone criticism is that there is no nice way to describe (1) a district court's personal threats to a litigant, *see* Petition For Writ Of Prohibition Or Mandamus at 7-18, (2) tolerance of calculated serial perjury, *infra* at 26-28, and (3) refusal to enforce many other substantive and procedural laws and orders in multiple expressions of the district court's bias against petitioner. Petition For Writ Of Prohibition Or Mandamus at 3-18. Full discussion is impossible given current page limitations, but the arguments were presented to the Third Circuit in over 100 pages of briefs and over 600 pages of appendices. Specifically, Judge Nygaard complains about petitioner's *ad hominem* criticism of the district court. But any analysis of judicial personal bias under 28 U.S.C.§144 or judicial misconduct under 28 U.S.C. §372 is by definition *ad hominem* criticism. Blanket prohibition amounts to the assertion that judges are entirely above the law. Moreover, no linguistic tone complaint can possibly affect the Third Circuit's obligation to decide appeals in accordance with U.S. Supreme Court binding precedent. Finally, some

This is not even a pretense of appellate review. [9] Apparently, Judge Nygaard was unable to refute the arguments in petitioner's 50 page brief and 25 page reply brief, so he violated even the minimal requirements of Fifth Amendment due process by simply refusing to perform appellate review, even though said review is mandatory under 28 U.S.C. §1291.

This complete absence of analysis did not, however, prevent Judge Nygaard from declaring petitioner's appeal to be frivolous, so he ordered petitioner to pay another $20,000.00 to defense counsel for their 25 page appellate brief, bringing the total punitive fee reversal to $110,000.00.

Since early February 1999, the collection of this debt has been enforced through garnishment of 25% of petitioner's take-home pay. In April, the court supervising the garnishment also allowed garnishment of the remaining 75% of petitioner's wages from petitioner's direct deposit checking account, in clear violation of federal law (15 U.S.C. §1673) limiting all garnishment to 25% of take-

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of the specific linguistic tone complaints are just inaccurate.

[9] Apparently aware that his five page opinion contained absolutely no legal or factual analysis, Judge Nygaard photocopied the district court opinion, attached it to the end of his opinion, and then retyped the pagination to make the whole thing initially appear to be one document. The appendix of this petition presents only the first five pages of the appellate opinion, since the rest is already attached as the district court's opinion, but petitioner has retained the document prepared by Judge Nygaard in what appears to be an effort to avoid labor.

home pay, based on the specious argument that when wages are electronically transferred to a bank account they cease to be "wages" and may garnished. Petitioner's employer will pay salaries only via direct deposit to reduce administrative costs, so the option of receiving a paycheck is unavailable. Consequently, opposing counsel can now garnish 100% of petitioner's wages in an effort to drive petitioner into immediate personal bankruptcy.

This is undoubtedly one of the most severe financial sanctions ever imposed against an attorney in the entire history of the federal judiciary, as both judges were aware that petitioner is a government attorney. Obviously, judges Lifland and Nygaard reacted emotionally to petitioner's arguments, rather than performing dispassionate review of the facts and the law. They may have been initially inflamed because of the subject matter of the case, *i.e.*, racial discrimination indirectly involving interracial dating; but despite the district court's early expressions of bias against petitioner,[10] the matter was headed for trial by jury as of November 1997.[11] In November 1997, however, the district court personally threatened petitioner, and petitioner filed motions on judicial bias and misconduct.[12] This too may have inflamed judges Lifland and Nygaard.[13]

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[10] *See* Petition For Writ Of Prohibition Or Mandamus at 3-10.

[11] Indeed, the trial brief was completed and signed by the district court in November 1997. Why would the district court have ordered preparation of the joint trial brief if it believed the case to be frivolous? A truly frivolous case should not have gotten past the April 1997 F.R.C.P. 16 pretrial conference: "**Rule 16(c) Subjects for Consideration at Pretrial Conferences** ... (1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses ..."

[12] Petition For Writ Of Prohibition Or Mandamus at 7-12.

Clearly, this $110,000.00 sanction has absolutely no basis in any analysis of the merits of petitioner's case against The Right Stuff, and these judges have indulged themselves in violations of the rule of law, and this Court will share complicity if it does not address petitioner's arguments. As it stands now, this case is an angry statement of judicial support for Caucasian privilege without regard to the law, including the law as written by this Court. *See* Philip Anderson, *President's Message: Justice And Inequality Don't Mix,* ABA Journal (May 1999):

> In preparation for a national symposium, the American Bar Association commissioned a survey on public perceptions of the justice system ...The most disturbing thing about the survey was that 47 percent of the respondents believe that in most cases, the courts do not treat all ethnic and racial groups the same ... White lawyers, for the most part, had not seen evidence of racial bias in the justice system; black lawyers had ... I have been asked if these are simply perceptions, or if the perceptions are real. They must be real. Too many people have had

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[13] *See* Petition For Writ Of Prohibition Or Mandamus at 19-21 (citing Anthony D'Amato, *Self-Regulation Of Judicial Misconduct May Be Mis-regulation*, 89 Mich. L. Rev. 609, 609-10 (1990) ("We perhaps demand too much of human nature if we expect judges to be unconcerned with the loss of public prestige that results from admitting that cases of serious judicial misconduct are not extraordinarily rare.")). The attorneys fees decision even identifies petitioner's bias claim as one of the three reasons for fee reversal, app., *infra*, 88-95, and the appellate opinion discusses virtually nothing but petitioner's *ad hominem* criticism of the district court, app., *infra*, 1-5, even though any claim of bias or misconduct by definition must be *ad hominem*.

> similar experiences. We have a problem that we must acknowledge and address ... This is the ultimate challenge to the integrity of the rule of law in America..

Id. at 6.[14]

REASONS FOR GRANTING THE PETITION

Review on a writ of certiorari should be granted in this racial discrimination in public accommodations case because the Third Circuit below "has decided important federal question(s) in a way that conflicts with relevant decisions of this Court" and other U. S. Courts of Appeal. Furthermore, the Third Circuit below "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Rule 10(a), (c).

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[14] *See also How The Public Views The State Courts: A 1999 National Survey*, National Center for State Courts (May 1999) (83% of all surveyed feel that people "like themselves" are treated fairly in state court, but 70% of African-Americans think they are treated worse than other groups, and over 40% of whites agreed that African-Americans do not receive fair treatment, and about half of all surveyed think that African-Americans and Hispanics are treated worse than any other group identified in the study; also 81% of all surveyed said that political bias influences court decisions). *See also* Joan Biskupic, *Justice O'Connor Calls for 'Concrete Action' To Fight Bias*, Washington Post, 16 May 1999 at A5 (discussing Justice O'Connor's reaction to the National Center for State Courts survey; "Clearly this is a problem that has to be addressed ... [c]oncrete action must be taken" to erase racial bias). *See also* M. Berry, *The Pig Farmer's Daughter And Other Tales Of American Justice: Episodes of Racism and Sexism in the Courts from 1865 to the Present* (1999) ("After all, [she] was but a pig farmer's daughter; [so] in resolving the conflict between competing versions of the rape, the higher court "chose to affirm white male privilege ...").

I. The Third Circuit Decision Is Contrary To Binding Precedent Of The U.S. Supreme Court And The Precedent Of Other Circuits, Including The Third Circuit Itself

In summarily affirming the district court, the Third Circuit violates rulings of this Court and various circuit courts, including the Third Circuit itself, on racial discrimination, on the use of summary judgment, and on federal jurisdiction.

A. The Third Circuit Decision Is Contrary To U.S. Supreme Court Binding Precedent And The Precedent Of Other Circuits, Including The Third Circuit Itself, On Racial Discrimination

The Third Circuit (summarily affirming the district court) admits that racial discrimination in public accommodations cases are to be decided using the three-step analytical framework of McDonnell Douglas v. Green, 411 U.S. 792 (1973). App., *infra*, 16-17. First, the plaintiff makes a prima facie showing of discrimination. Second, defendant must articulate some objective, reasonable, legitimate business purpose for his decision. Third, plaintiff must show that the defendant's explanation is a subterfuge, a pretext, a lie. *See also* United States v. Lansdowne Swim Club, 894 F.2d 83, 88 (3d Cir. 1990).[15]

This analytical framework is justified because no one can be expected to read a litigant's mind in a search for discriminatory animus, as the liable party has strong incentives to obscure her thinking, and obscuring one's private thoughts is child's play. United States Postal Service v. Aikens, 460 U.S. 711, 715 (1983) ("There will seldom be eyewitness testimony as to the [defendant's] mental processes."); Trans World Airlines v. Air Line Pilots Assn., 469 U.S. 111, 121 (1985) ("The shifting burdens of proof set forth in McDonnell Douglas are designed to assure that the plaintiff [has] his day in court despite the unavailability of direct evidence."); Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor concurring with four justice "majority") ("As should be apparent, the entire purpose of the McDonnell Douglas [analysis] is to compensate for the fact that direct evidence of intentional discrimination is hard to come by.")

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[15] The district court (summarily affirmed by the Third Circuit) violated this binding precedent by inventing its own stage two excuse for The Right Stuff. The authorities all state that the accused must offer her own stage two excuse. This is especially significant given the district court's rejection of respondents' explanations. *See infra* 20-24.

This three part system demands virtually nothing of racial discriminators. Few people will take the time and effort to enforce their rights, so illegal racial discrimination usually carries no cost. *See How The Public Views The State Courts* (showing that 68% of all surveyed do not think that taking a case to court is affordable). Moreover, even after having been sued, defendants can assert any possible explanation for their conduct that cannot be easily disproved. Since the defendant is merely required to describe her own thoughts, she can make up almost any rationale for her actions that she desires.

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) modified discrimination law in that proving pretext no longer compels a finding of racial discrimination, but instead creates a jury question:

> The factfinder's disbelief of the reasons put forward by the defendants (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional

> discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, 'no additional proof of discrimination is required.' ... But the Court of Appeals holding that rejection of the defendant's proffered reasons compels judgment for the plaintiff ... ignores our repeated admonition that the Title VII plaintiff at all times bears the 'ultimate burden of persuasion.'

Id. at 510. (emphasis added, citations omitted) *See also* Shager v. Upjohn Co., 913 F.2d 398, 401, 403 (7th Cir. 1990) (age discrimination in employment opinion reversing summary judgment for defendant):

> If the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one, such as age, may rationally be drawn. This is the common sense behind the rule of McDonnell Douglas ... The trier of fact must decide after a trial whether to draw the inference. The lie may be concealing a reason that is shameful or stupid but not proscribed, in which event there is no liability ... The point is only that if the inference of improper motive *can* be drawn, there must be a trial ...

(emphasis added but italics in original).

Yet the Third Circuit (summarily affirming the district court) asserts that petitioner must prove both that the stage two defense is a pretext and then independently prove that respondents were motivated by discriminatory animus, just to survive summary judgment. App., *infra*, 16-17. This demand for a showing of pretext and "evidence suggesting a racially discriminatory motive" nullifies the basic rationale of McDonnell Douglas and its progeny. Petitioner need only successfully attack the logic and credibility of the stage two excuse. There is no further obligation to present any evidence whatsoever, after the prima facie case has been established, including any evidence regarding motive. The idea behind McDonnell Douglas is that a lying defendant is probably a guilty defendant. St. Mary's, 509 U.S. at 510.[16]

The importance of this misstatement of the law justifies granting certiorari all by itself, especially given the nearly universal unavailability of direct evidence on racial animus or direct evidence on what any defendant was thinking at any time.

B. The Third Circuit Decision Is Contrary To U.S. Supreme Court Binding Precedent And The Precedent Of Other Circuits, Including The Third Circuit Itself, On The Use Of SummaryJudgment

The Third Circuit (summarily affirming the district court) admits that Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) is controlling on the legal standard for summary judgment. App., *infra,* 10.

Anderson demands that in all summary judgment cases, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255. The court must resolve all uncertainty about the facts in favor of the non-moving party:

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[16] For example, The Right Stuff has adopted and subsequently abandoned different stage two excuses, including some stated under oath. This proves pretext and pretext requires a trial. Also, respondents excuse doing business with a known rapist, admitting that it may have been shameful or stupid, but insisting that it is not evidence of racial discrimination. Under St. Mary's, this is a jury decision.

> Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson, 477 U.S. at 255. (emphasis added)

Factfinding on a litigant's credibility regarding her thoughts and motives, as required in this case, even more clearly demands "observation of the demeanor of [the] witnesses in order to evaluate their credibility." Fed.R.Civ.P.56 (Advisory Committee Notes to 1963 Amendment). The issues of motive and intent are not matters for summary judgment. E.g., Conrad v. Delta Airlines, 494 F.2d 914, 918 (7th Cir. 1974); Leonard v. City of Frankfort, 752 F.2d 189, 194 (6th Cir. 1985). Consequently, summary judgment is disfavored in discrimination actions. E.g., Bronze Shields, Inc. v. New Jersey Dept. Of Civil Service, 667 F.2d 1074, 1087 (3rd Cir.1981); Hillebrand v. M-Tron Industries, Inc., 827 F.2d 363 (8th Cir. 1987); Hayden v. First National Bank, 595 F.2d 994, 997 (5th Cir. 1979).

On the appeal of a district court order granting summary judgment, the appellate court exercises plenary review and considers the issues using the same standards applicable to the district court. There is no presumption that the district court's decision is correct. Jefferson Bank v. Progressive Casualty Insurance, Co., 965 F.2d 1274, 1278 (3d Cir. 1992).

Yet the Third Circuit (summarily affirming the district court) rests entirely on the conclusion that there is an insufficient factual showing of racial discrimination to justify a jury trial, app., *infra*, 16-17, even though the 16 page district court opinion is virtually nothing but a review of contested material facts all resolved so as to reach summary judgment. This is precisely what Anderson forbids. Moreover, the key question of fact is why did The Right Stuff refuse to do business with the petitioner, and the district court's resolution of this dispute is wildly in violation of Anderson.

A district court satisfied to merely stand Anderson on its head would resolve this dispute in favor of the summary judgment movant by adopting either the "three strikes" or the "endangering the clients" version of the facts. Of course, Anderson demands adoption of the non-movant's proposed finding that respondents have changed their story at will and are no longer sufficiently credible to offer any believable explanation for their conduct.

But this district court decided to stand Anderson on its head and then pull it inside out as well by inventing a new version of the facts, a version not offered by either litigant, that cannot be reconciled with any part of the record. The district court found --- having rejected both "three strikes" and "endangering the clients" --- that The Right Stuff may legally (and did in this case) refuse service for no reason other than the owners' personal disapproval of petitioner's personality,[17] without proving the existence of any termination policy: "[I]t should not be necessary for any organization ... to have to publish a rule stating that the memberships of those who are inconsiderate, intrusive, obsessive or hurtful will be terminated." App., *infra*, 20.[18] The district court actually rejected petitioner's version of the facts and both of Dawne Touchings' sworn statements on what she was thinking when she and her co-owner refused to do business with petitioner.

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[17] The legal flaws of this finding are obvious. The district court tries to work around The Right Stuff's failure to state a single, credible stage two explanation by inventing a new excuse and then attempting to finesse the "private club" issue. "Private clubs," as opposed to "public accommodations," are not covered by anti-discrimination laws:

> The immunity we recognize today is a rather limited one ... [O]nly genuine private clubs are exempted from the 1866 and 1964 civil rights statutes. Those who believe that racial exclusion fosters fraternity are free to act out their belief, but they may not promote prejudice for profit ... To have their ways protected, clubs must function as extensions of their members' homes and not as extensions of their businesses. Racial prejudice will not be permitted to infect channels of commerce under the guise of "privacy."

Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182, 1204 (D. Conn. 1974). But a business, like The Right Stuff, is clearly not a "private club." Nonetheless, the district court surreptitiously introduces the private club standard by finding that The Right Stuff may legally (and did in this case) refuse service for no reason other than the owner's personal disapproval of petitioner's personality.

Moreover, Touchings explicitly denied having this mind set. *See supra* at 5 ("So we felt that for situations like that a three strikes policy was reasonable because we viewed it in the sense of not having to judge the person's appropriateness.")

[18] The district court cites Hall v. BioMedical Application, 671 F.2d 300, 302 (8th Cir.1982), app., *infra*, 18, for the proposition that no such rule or policy need be stated, but this is a false citation as Hall says absolutely nothing about this matter.

This is outright lower court nullification of Anderson, and some of the district court's many other findings of fact in violation of Anderson were discussed in Petitioner's Third Circuit briefs. App., *infra*, 52-54.

Moreover, the district court did not stop here in its assault on racial discrimination law. It also found that petitioner's claims were frivolous, and ordered petitioner to pay respondent's legal fees bill of over $90,000.00, thereby seeking to create a chilling effect generally discouraging future civil rights actions. In addition to the already nearly insurmountable obstacles against the racial discrimination plaintiff, now comes Judge Lifland's order to passively accept racist abuse or risk being driven into personal bankruptcy.

C. The Third Circuit Decision Is Contrary To Binding Precedent Of The U.S. Supreme Court On Federal Jurisdiction

The Third Circuit (summarily affirming the district court) admits that an award of attorneys fees under 42 U.S.C. §1988 and/or 42 U.S.C. §2000a-3(b) is discretionary and requires judicial analysis, and that to perform this judicial analysis, the district court must have jurisdiction over the case. App., *infra*, 87

On 7 May 1998, the district court granted summary judgment but rejected respondents' attached motion for fees and required a post-judgment motion with an independent briefing schedule. App., *infra*, 22. The motion was filed on 26 May 1998. App., *infra*, 57. But a post-judgment motion for fees must be filed within 14 days of the final decision on the merits as per Fed.R.Civ.P. 54, so the 1 June 1998 appeal terminated the district court's jurisdiction long before the 23 July 1998 fee award. App., *infra*, 121; Fed.R.Civ.P. 54; Wright v. Jackson, 522 F.2d 955, 957-58 (4th Cir. 1975).

In briefing the attorneys fees motion, petitioner informed the district court that it had relinquished jurisdiction and could no longer award discretionary fees. The district court's fees opinion then pointlessly cited Budinich v. Becton Dickson & Co, 486 U.S. 196 (1988) in asserting retained jurisdiction over this matter. App., *infra*, 87. In Budinich, 486 U.S. at 197, the attorneys fees movant filed a timely motion. That is not the case here, and that is the whole point. Moreover, the Budinich analysis precedes amendments to Rule 54 explicitly intended to eliminate confusion on the timing of attorneys fees motions and the termination of district court jurisdiction following appeal. Fed.R.Civ.P. 54 (Advisory Committee Notes, 1993 Amendments). Now it is crystal clear that a motion for fees must be filed within 14 days of judgment. Respondents motion was not. Consequently, jurisdiction passed to the Third Circuit.

Steel Company v. Citizens For A Better Environment, 523 U.S. 83 (1998) clearly holds that a court cannot act without first establishing its jurisdiction:

> Without jurisdiction the court cannot proceed at all in any cause ... Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause ... This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it ... The requirement that jurisdiction be established as a threshold matter springs from

> the nature and limits of the judicial power of the United States and is inflexible and without exception ... For a court to pronounce upon the ... law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.

Id. at 1012, 1016. (emphasis added)

Steel Company was released nearly five months before the district court's attorneys fees decision and was cited at length by petitioner before the Third Circuit.[19]

II. The Third Circuit Ignores Calculated Serial Perjury

In affirming the district court, the Third Circuit demonstrates unwillingness to prevent repeated violation of the oath to tell the truth, the whole truth, and nothing but the truth, and this seriously undermines the integrity of the judicial system.

The Right Stuff's progression through five different step two excuses has been described *supra* at 5-11. Apparently, Touchings just says under oath whatever seems most advantageous to her at the moment, strangely confident that the oath to tell the truth during sworn testimony is simply a joke, at least in the context of civil rights litigation. Describing all of her perjury, not just the parts contradicted by her own subsequent sworn testimony, would take several more pages.

---

[19] There are also many other reasons why the award of attorneys fees must be overruled, *see* Petition For Writ Of Prohibition Or Mandamus at 25-29, including (1) petitioner's claims are not frivolous, and would otherwise have been challenged by defendants or the district court at the pretrial conference under F.R.C.P. 16(c)(1), but there were no such challenges, (2) respondents cannot claim fees for any work prior to the end of discovery, since they did not even allege that petitioner's claims were frivolous until that time, and (3) the district court cannot award discretionary fees without having jurisdiction over the case.

The U.S. Supreme Court has forcefully condemned perjury, saying that "[i]n this constitutional process of securing a witness' testimony, perjury simply has no place whatever" and that "[e]ffective restraints against this type of egregious offense are therefore imperative." United States v. Mandujano, 425 U.S. 564, 576 (1975) (plurality opinion). The insidious effects are the same whether the case is civil or criminal. *E.g.*, ABF Freight Systems, Inc. v. NLRB, 510 U.S. 317, 323 (1994).

Presumably this is especially so when the perjury is so blatant that it can be proven by simply comparing one of Ms. Touchings' sworn statements to another because she could not even be bothered to stick to the same lie under oath when faced with mere civil liability. Yet neither the district court nor the Third Circuit nor the U.S. Attorney's Office even reacted to petitioner's report of perjury.[20] One would think that both judges Lifland and Nygaard would have explicitly expressed outrage over petitioner's charge of perjury, instead of petitioner's allegations against the district court, if they felt the assertion to be baseless. Yet they said nothing about this. If there is no penalty for perjury in a racial discrimination case, then every one of respondent's factual assertions is worthless, and for this reason alone there is no basis whatsoever for the district court's opinions. Furthermore, if this Court permits respondents to "try out" sworn testimony, only to renounce it in search of a better defense, then the federal judiciary as a whole will quickly become a national joke.

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[20] The U. S. Attorney's Office Newark, N.J., Chief of Criminal Division, Patty Shwartz, initially assigned petitioner's written report of perjury to the FBI and then later told the FBI that there would be no prosecution. Shwartz could offer no explanation for the failure to prosecute, attempted to blame the decision on the FBI, and told petitioner that she had gotten his letter but not the attachments to same and asked petitioner to resubmit the material. Since then, Shwartz has refused to answer petitioner's calls and letters. Given this Court's stated position on perjury, it cannot fail to at least hold Touchings in contempt of court. Indeed, the evidence of illegality is so clear that this case may be of interest to legal scholars who study the relationship between race and law enforcement. *See, e.g.*, Angela J. Davis, *Benign Neglect Of Racism In The Criminal Justice System*, 94 Michigan Law Review 1660 (May 1996); Judge Arthur L. Burnett, Sr., *Permeation Of Race, National Origin And Gender Issues From Initial Law Enforcement Contact Through Sentencing*, 31 Am. Crim. L. Rev. 1153

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: 14 June 1999

Respectfully submitted,

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Petitioner *pro se*

(Summer 1994); Paul Butler, *Race Based Jury Nullification: Case-in-Chief*, 30 J. Marshall L. Rev. 911 (1997)

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UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-6113
WAGNER D. JACKSON, JR.
Appellant,

V.

THE RIGHT STUFF; DAWNE TOUCHINGS; PAULA KRONGARD
[sic]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 97-CV-00555)
District Judge: Honorable John C. Lifland
Submitted Under Third Circuit LAR 34.1(a)
January 11, 1999

BEFORE: NYGAARD, ALITO and LEWIS, Circuit Judges.

(Filed Jan 28, 1998)

MEMORANDUM OPINION OF THE COURT

NYGAARD, Circuit Judge.

Appellant, Wagner Jackson, Esq., appeals from an order of the District Court which granted summary judgment in favor of defendants The Right Stuff, Dawne Touchings, and Paula Krongard (collectively, "The Right Stuff'), and awarded them over $90,000 in attorney fees. Jackson is a trial attorney with the United States Department of Justice. He claimed in his suit that The Right Stuff, a dating service, terminated his membership because of his race and/or his gender. He alleges as error the issues listed in paragraph I, taken verbatim from his brief. We conclude that the District Court did not err, and we will affirm. Moreover, because his brief is unprofessional in the extreme and the appeal wholly frivolous, we conclude that Federal Rule of Appellate Procedure 38 damages are appropriate.

I.

The allegations of error asserted by appellant are as follows:

a.[sic] Whether the district court's decision to grant defendants' motion for summary judgment must be overruled because it is based on a biased assessment of a series of disputed material facts related to defendants' motive and intent and a sub silentio legal analysis so inconsistent with precedent that the district court dares not state it.

2. Whether the district court's limitations on plaintiff/appellant's discovery must be overruled because they have prevented full development of the most important factual matter in this case, i.e., the question of whether defendant dating service admitted a known rapist after terminating plaintiffs membership, thereby belying defendants' excuse for their acts of racial discrimination.

3. Whether the district court's failure to impose sanctions on defense counsel must be overruled because the decision is so wildly and comically illogical.

4. Whether the district court's failure to assign a new judge due to bias must be overruled.

5. Whether the district court's spiteful award of attorneys fees against plaintiff/appellant must be overruled.

II.

The facts and procedural history of this case are well known to the parties and the Courts, the District Court opinion states them accurately, and it is not necessary that we restate them here. Moreover, under the usual circumstances when we affirm by Memorandum Opinion and Judgment, we "briefly set[] forth the reasons supporting the court's decision." United States Court of Appeals for the Third Circuit, Internal Operating Procedure (I.O.P.) 5.4. The reasons for writing an opinion are threefold: to instruct the District Court, to educate and inform the attorneys and parties, and to justify our decision. We use a memorandum opinion in cases in which a published opinion is rendered unnecessary because the opinion has no institutional or precedential value. See I.O.P. 5.2. In this case, however, we have concluded that neither a full memorandum explanation nor a published opinion is indicated because the opinion filed by the District Court adequately explains and fully supports its order and wholly refutes the appellant's allegations of error. Hence, we believe it unnecessary to offer further explanations and reasons, in addition to those given by the District Court, why we will affirm. it is sufficient explanation to say that, essentially for the reasons given by the District Court in its opinion dated the 7th day of May, 1998, and appended hereto, we will affirm.[1]

We find it necessary, however, to address the quality and tenor of the brief filed by Attorney Jackson, who, without legal support for his position, resorts instead to insult and verbal abuse.[2] He refers to the District Court's decisions as "spiteful ... .. wildly and comically illogical," "ridiculous[]" and the product of "muddled thinking." He accuses the District Court of "unprofessional hostility," of employing "lazy and sloppy fact-finding," of "ignoring evidence," of granting summary judgment because of "personal presumptions and biases and the ideology that made him attractive to the Reagan Administration,"[3] of "bias [] in favor of the defendants," and of a "willingness to intentionally ignore the law to reach a personally desired result." Jackson, however, can point to nothing legitimate to support his accusations, nor does he show how the judgment results from a "bizarre conclusion" and "Alice in Wonderland reasoning" or how the District Court's "bias against plaintiff/appellant is more emotionally compelling than its dedication to duty."

---

[1] Jackson also appeals several orders entered prior to summary judgment. We find no error with those rulings, including the September 8, 1997, denial of Jackson's motion for sanctions against defense counsel and Magistrate Hedges's July 7, 1997, order prohibiting Jackson's contact with Right Stuff members not involved in this litigation. Also, Jackson appeals the post-judgment July 22, 1998, order awarding costs and attorneys' fees to defendants. We also find no error in this ruling.

[2] We recommend that Attorney Jackson refer to Local Appellate Rule 28.1 for our requirements and threshold professional expectations for a brief.

Throughout the brief, he tries to denigrate the District Judge, by referring to him, not by title, but as "Lifland." He refers to the Magistrate Judge as "very feeble-minded," and accuses him of employing "twisted reasoning" and "thuggish threats."[4] Jackson refers to The Right Stuff s fee claim as an "arrogant and silly notion" that is the result of The Right Stuff counsel's "stupidity." In sum, the brief reflects a person who, unable to marshal logical and supportable reasons why we should reverse, instead resorts to invective and, in lieu of a legal argument, employs an ad *hominem* attack.

All of the foregoing sinks well below the horizon of professionalism we expect of attorneys who practice before this Court. Moreover, it fails to rise above a frivolous attempt to challenge orders of the District Court. Appellant

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[3] And in another non-argument he says "Apparently the Reagan Administration successfully identified three white men who would commit themselves to the even the [sic] ridiculous assertions to eviscerate the law against racial discrimination."

[4] Attorney Jackson filed a judicial misconduct complaint against the Magistrate Judge, which was denied by the Chief Judge. On petition for review, the Judicial Council, by order entered on December 11, 1998, at 98-42, affirmed the Chief Judge.

Jackson was ordered to pay in excess of $90,000 in costs and attorneys' fees at the District Court level. We see no reason why the appellees should not also recover the fees they paid their attorneys to defend their judgment against an illegitimate attack by Jackson in this Court. Jackson will be directed to pay damages under Appellate Rule 38 as follows: to the Court, double costs; and to the appellees, the amount of fees paid to attorneys on this appeal. Appellees shall submit affidavits substantiating the amount they have paid their attorneys on appeal within fifteen days from the date this opinion and order are filed. Appellant shall have fifteen days thereafter to respond.

III.

In sum, for the foregoing reasons, we will affirm the orders of the District Court dated the 7th day of May, 1998. Within fifteen days from the date hereof, the appellees shall file affidavits substantiating whatever claim they may have for fees paid to their attorneys on appeal. Jackson shall have fifteen days thereafter to respond.

TO THE CLERK:
Please file the foregoing opinion.

/s/
Circuit Judge

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-6113
WAGNER D. JACKSON, JR.,
v.
THE RIGHT STUFF; DAWNE TOUCHINGS; PAULA KRONGARD

On appeal from the United States District Court
for the District of New Jersey
(D.C. No. 97-CV-00555)

SUR PETITION FOR REHEARING
BEFORE: BECKER, Chief Judge., [sic] SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, LEWIS, MCKEE and RENDELL, Circuit Judges

The petition for rehearing filed by the Appellant in the above-entitled case, having been submitted to the judges who participated in the decision of the this court and to all other available circuit judges in regular active service, and no judge who concur-red in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court in banc, the petition for hearing is hereby **DENIED.**

By the Court,

/s/
United States Circuit Judge

DATED: Mar 17, 1999
LD/cc: WDJ, FE

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WAGNER D. JACKSON, JR., PLAINTIFF,	CIVIL ACTION NO: 97-555(JCL)
V.	
THE RIGHT STUFF, DAWNE TOUCHINGS AND PAULA KRONGARD, DEFENDANTS.	**OPINION**

LIFLAND, District Judge

Presently before the Court is Defendants' motion for summary judgment. For the reasons set forth below, the Court will grant Defendants' motion.

STANDARD OF REVIEW

Summary judgment eliminates unfounded claims without recourse to a costly and lengthy trial. Celotex Corp v. Catrett, 477 U.S. 317, 327 (1986). However, a court should grant summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden of showing that no genuine issue of material fact exists rests initially on the moving party. Celotex, 477 U.S. at 323. A litigant may discharge this burden by exposing "the absence of evidence to support the nonmoving party's case." Id at 325. In evaluating a summary judgment motion, a court must view all evidence in the light most favorable to the nonmoving party. Matsushita Elec- Indus. Co. Ltd v Zenith Radio Corp., 475 U.S. 574, 587 (1986); Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977).

Once the moving party has made a properly supported motion for summary judgment, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The substantive law determines which facts are material. Id at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. No issue for trial exists unless the nonmoving party can demonstrate sufficient evidence favoring the nonmoving party such that a reasonable jury could return a verdict in that party's favor. See id. at 249.

BACKGROUND

Plaintiff, a United States Department of Justice trial attorney, practicing law for over thirteen years, filed this action pro se on February 3, 1997, claiming that his membership in The Right Stuff, Inc., a dating service, was terminated on the basis of his race and/or sex. Plaintiff claims that Defendant The Right Stuff, Inc. and its owners Dawne Touchings and Paula Krongard[1] ("Defendants") discriminated against him based upon his gender and/or his race (African-American/Native-American), in violation of 42 U.S.C. § 1981 ("§ 1981"); Title 11 of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, et. seq. ("Title Il"); and the New Jersey Law Against Discrimination ("NJLAD"), N.J. S.A. 10:5-1, et. seq., by terminating his membership in the dating service in or about May 1995.

Defendants contend that Plaintiffs membership in The Right Stuff was terminated as a result of his improper conduct towards other members and was in no way based on Plaintiff's gender or race. The alleged improper conduct included baselessly accusing one woman of being a racist and a liar after she declined to date him a second time and using improper methods to learn the identity and work telephone number of another woman who failed to return Plaintiff's calls to her home.

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[1] As of March 1997, Defendant Touchings became the sole owner and operator of The Right Stuff. (Touchings Dep. 4:23-5:11)

The Right Stuff is a dating service that caters exclusively to the graduates and faculty of select prestigious colleges and universities. (Pl. Dep. 29:11-23 .)[2] Right Stuff members receive a monthly mailing that lists the anonymous short profiles of other members. (Ex. E at 3.) Members may then order, for a fee, the biographies that correspond to short profiles that they find appealing. Id. Based on the information contained in these biographies a member can then contact another member by mail or by phone, depending upon the wishes stated by the member, if any, to attempt to set up a date. (Ex. H.) The Right Stuff instructions expressly ask members to comply with other members' wishes regarding method of contact. (Ex. H; E at 4.)

Plaintiff, who was eligible to participate in The Right Stuff as a graduate of Harvard College and Yale Law School, submitted his application materials in or about September 1994. (Pl. Dep. 8:12-14; 11: 10- 12; 30:20-31:2; 24:20-25.) Plaintiff did not include a photograph of himself in his submission. (Pl. Dep. 36:8-10.) Over the course of his membership, Plaintiff ordered approximately 40 biographies and went on dates with approximately 12 to 15 The Right Stuff members. (Pl. Dep. 43:3-43:21; 44:25-45:2; Ex. E at 4.)

According to Defendants, Plaintiff caused two members to complain to The Right Stuff about his behavior. (Def. Br. at 5.) Plaintiff ordered the biography of one of these members, Francoise Haan, late in 1994. (Pl. Dep. 80:5-7; 81:7-13; Ex. J.) Haan's biography included only the nickname "Frankie," and an instruction to "pls contact by phone," with an arrow pointing to her home telephone number. Haan's biography did not include her full first or last name, her home or work address, her work telephone number or a picture. (Pl. Dep. 80: 1014; 80:19-81:2; 83:23-84:3; Ex. J.) Plaintiff called Haan at her home three times, leaving messages on her answering machine each time. (Pl. Dep. 81:7-20; 82:3-83:18.) Haan did not return Plaintiff's calls. Although Haan's biography only contained her nickname, it did state that she had graduated from Georgetown Law School in 1981. According to Plaintiff's own account, he then went to Georgetown Law School, where he looked through the student directory that included pictures of the students who had graduated in 1981. Plaintiff looked for a "blond woman whose name suggested the nickname Frankie" until he came across a picture of Francoise Haan. (Pl. Dep. 14:14-17; 85:15-88:2-, Ex. E at 4.) He then checked in the phone book to make sure that the home phone number for Frankie matched up with the listing for Francoise Haan. After seeing that the listing did match up, Plaintiff used the Martindale Hubbell directory to find Haan's place of employment. Despite The Right Stuff s instructions and Haan's direction to call her at home, Plaintiff used the information he had discovered to call Haan at work, and demanded to know why she had not returned his phone calls to her home. (Pl. Dep. 83:20-84: 10; Ex. E at 4; Ex. H; Ex. J.)

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[2] Selected portions of Plaintiff s deposition can be found in the Certification of Francine Esposito, at Exhibit A. Further, references to Exhibits by the Court refer to the Exhibits in the Certification of Francine Esposito.

Plaintiff admits that Haan was audibly upset at the prospect of being the subject of Plaintiff's investigative efforts, and by Plaintiffs unwanted and intrusive call at work. (Pl. Dep. 88:3-24; 90:21-91:2; Haan Cert. at para. 14.) Haan then called Defendant Touchings to complain about Plaintiff's disturbing behavior and to terminate her membership in The Right Stuff. (Touchings Dep. 78:2-4;

153:14-25; Haan Cert. at 15.) Plaintiff admits that Haan did not know, and therefore could not have notified Defendant Touchings of, Plaintiff's race. (Haan Cert. at para. 6.)[3]

The second The Right Stuff member to complain about Plaintiff's behavior was Dorothy "Liz" Miller ("Miller"). After ordering her biography, Plaintiff went on a date with Miller in April 1995. (Pl. Dep. 48:8-52:17; Ex. E at 4.) Miller subsequently called Plaintiff to cancel a scheduled second date with Plaintiff. She told Plaintiff she was canceling the date because her father was ill. (Pl. Dep. 49:15-20; 50:5-10; Ex. E at 4.) Thereafter, Plaintiff called Miller, who again informed him that she did not wish to date him, because her father, who had attempted to commit suicide, was mentally ill and hospitalized. (Pl. Dep. 50:5-10; 61:14-62:14.) On or about April 26, 1995, Plaintiff again contacted Miller seeking a date. Miller told Plaintiff that she did not wish to date him, this time because she was involved in an exclusive relationship. (Pl. Dep. 50:6-15; Ex. E at 5.) Plaintiff became angry and upset with Miller, because of her rejection of him, and sent her a sarcastic and insulting letter via electronic mail that stated:

> Your "instant romance" story is insultingly ridiculous. First, the timing alone makes it impossible to take you seriously. Second, you told me two or three weeks ago that you

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[3] The affidavits of other female The Right Stuff members who had dated Plaintiff point out that each of them either did not know Plaintiffs race and/or that Plaintiff's race played no part in their decision not to date him or not to go on a second date with him. For instance, a member who went on one date with Plaintiff stated that "Mr. Jackson's race, which I assumed to be white, had nothing to do with my negative impressions of him." (Languas Cert. at 2.) Another member who went on one date with Plaintiff stated that she thought Plaintiff "was an odd character" and that he seemed "desperate." (Seidenburg Cert. at 1.) This member also stated that "Mr. Jackson's race had nothing to do with my negative impressions of him." Id. at 2.

> were so torn up over your poor sick father that you couldn't possibly date anybody. Now, I'm supposed to believe that this is precisely when "instant boyfriend" made his move.
> I suspect that you simply refuse to date anyone who isn't a member of "the master race," but you're too spineless to admit this. You were enthusiastic about about (sic) meeting during our first telephone conversation, and you even appeared to enjoy our brunch date, but since then you've been making up excuses to avoid another meeting. Apparently, you've decided that whether you enjoyed meeting me is irrelevant, because you simply can't keep seeing someone who isn't white. You should have said something like this in your Right Stuff bio, e.g., "SWM only." This would have saved you from having to make up a series of false excuses. I don't knowingly associate myself with bigots.

(Ex. K; Pl. Dep. 54:8-55.3; 55:16-19; 62:12-14; 72:1-20; Ex. E at 5.) Plaintiff admits that he had no reason to believe that Miller was a racist, except for the fact that she refused to go on . a second date with him and because of Plaintiffs "general knowledge of American society." (Pl. Dep. 68:1-10.)

Plaintiff subsequently sent Miller another e-mail which demanded that she terminate her membership with The Right Stuff. (Pl. Dep. 79:6-13; Ex. E at 5.) Miller then called Defendant Touchings in April 1995 to complain about Plaintiff's disturbing behavior and to terminate her membership in The Right Stuff. (Touchings Cert. at 13; Miller Dep. 28:1929: 11; 62:9-2 1.)

When Plaintiff did not receive his monthly The Right Stuff mailing by May 5, 1995, he left a message at The Right Stuffs toll-free number and sent a registered letter to their P.O.Box inquiring as to the whereabouts of his monthly mailing. (Pl. Dep. 96:4-23; 95:24-96:2; 98:5-12.) Plaintiff then contacted the U.S. Post Office to obtain from The Right Stuff's P.O. Box listing Defendants' full names and addresses, which had not been included in any of The Right Stuff's literature. (Pl. Dep. 98:12-25; 102:9-11; 104:15-105:2; 100:21-25.) With this information, Plaintiff called and left a message at Defendant Krongard's home to find out why he had not received his monthly mailing. (Pl. Dep. 102:25-103:1.)

Subsequently, Defendant Touchings telephoned Plaintiff and told him that she had not sent him the May mailing pending her investigation of two members' complaints about him. (Pl. Dep. 102:16-20; 115:11-19; 118:2-119: 1; Touchings Dep. 69:9-15; Ex. E at 5.) Plaintiff immediately became defensive and refused to acknowledge any wrong-doing [sic] on his part or the legitimacy of the two members' reactions to his behavior. (Pl. Dep. 120:4-122:14; Touchings Dep. 112:10-19.) As Plaintiff described at his deposition, it never occurred to him that Haan did not return his phone calls because she simply did not like the way his messages sounded. Further, Plaintiff likened his behavior (which violated The Right Stuff s direction to contact other members only in the manner they wished) to a violation of The Right Stuff s instruction to write in black ink and legibly on the application. (Pl. Dep. 94:5-95: 1; 84:16-24.) Also, Defendant Touchings asserts that it was only at this time that she realized that Plaintiff had not just used Haan's name to find her work number, but that Haan's biography did not include her last nameor any other information which would allow Plaintiff to contact her at work. (Touchings Dep. 144:23-145: 1; 146:5-15; 154:4-13.) With regard to his interactions with Miller, Plaintiff responded that he is "entitled to say what [he] think[s] to anybody." (Pl. Dep. 120:17-18.)

According to Defendant Touchings, Plaintiffs disturbing behavior and his reaction to the complaints about him concerned her, since it seemed likely to her that Plaintiff would continue to abuse other The Right Stuff members. (Touchings Cert. at para. 5.) Consequently, Defendants decided to terminate Plaintiffs membership in The Right Stuff at the end of May 1995. (Touchings Cert. at para. 6.) It is undisputed that at no time during his membership or during his conversation with Defendant Touchings did Plaintiff notify Defendants of his race. (Pl. Dep. 178:6-20; 36:25-37:10; 32:16-33:13; Ex. E (Pre-Trial Order, Stipulation of Facts) at 6.)

DISCUSSION

Plaintiff's complaint must be dismissed since he cannot ultimately demonstrate that Defendants discriminated against him based on either his race or gender. Plaintiff asserts his claims pursuant to § 1981, Title 11 and the NJLAD.

Section 1981 -Gender Discrimination

Section 1981 provides that: "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . ." 42 U.S.C. § 1981 (a). Section 1981 forbids intentional discrimination based upon race in the creation of contracts. See, e.g., Boykin v. Bloomsburg Univ. of Pennsylvania, 893 F. Supp. 400, 406 (M.D. Pa. 1995), aff'd 91 F.3d 122 (1996).

Defendants correctly point out that § 1981 only prohibits discrimination based on race, not on gender. Plaintiff does not dispute this assertion. Instead, Plaintiff seems to imply in his opposition brief that he never actually intended to submit a claim for gender discrimination when he says that his "reference to gender discrimination simply covers the possibility that The Right Stuff discriminates against non-Caucasian men but not non-Caucasian women." (Pl. Br. at 10, n. 11.) Regardless of what Plaintiff meant to assert in his complaint, Plaintiff's gender discrimination claims under § 1981 must be dismissed, since that section does not prohibit gender discrimination.

Title II-Gender Discrimination

Title II was enacted to create a federal cause of action for discrimination due to race, color, religion and nationality in places of public accommodation. Title II states in relevant part that: "[a]ll persons shall be entitled to the full and equal enjoyment of . . . any place of public accommodation ... without discrimination or segregation on the ground of race, color, religion, or national origin. " 42 U. S. C. § 2000a(a). Defendants also correctly assert that Title II does not prohibit gender discrimination and Plaintiff does not dispute this assertion. Consequently, Plaintiff's gender discrimination claims under Title II will also be dismissed.

The NJLAD-Gender Discrimination

The NJLAD provides in relevant part that: [a]ll persons shall have the opportunity to obtain all the accommodations . . . of any place of public accommodation ... without discrimination because of race . . . color ... or sex . . ." N.J.S.A. § 10:5-4. The New Jersey courts have interpreted the proofs and burdens of persuasion for discrimination under the NJLAD in generally the same manner as under the federal discrimination statutes. See Abrams v. Lightolier Inc., 50 F.3d 1204, 1212 (3d Cir. 1995) (citing McKenna v. Pacific Rail Service, 32 F.3d 820, 827 (3d Cir. 1994)). Thus, the standards applied by the Court in determining Plaintiffs NJLAD claims are the same as for his federal statutory claims. However, unlike § 1981 and Title II, the NJLAD does prohibit gender discrimination.

Plaintiff's allegations of gender discrimination under the NJLAD are without merit. Plaintiff has failed to articulate any reason to believe that Defendants' actions towards him were in any way based upon his gender. It is self-evident that both men and women are needed by, have applied to, and been accepted by, The Right Stuff. There is no evidence that Defendants exclude anyone from membership in The Right Stuff based on gender. Further, Plaintiff does not even allege that similarly situated females were treated more favorably than he was treated. (Pl. Dep. 130:10-14.) Defendants point out that they did in fact terminate the membership of a white female member who was attempting to sell investments to other members. (Touchings Dep. 51:7-11.) Plaintiff even admits that he "doesn't have any independent evidence dealing with the subject of gender . . . " and that he only included this allegation since he didn't "know exactly how [Defendants] discriminated . . ." (Pl. Dep. 129:17'130:9.) Since Plaintiff cannot establish that Defendants intentionally terminated his membership in The Right Stuff based upon his gender, his NJLAD gender discrimination claims must be dismissed.

Race Discrimination Claims

Defendants maintain that The Right Stuff is not a "place" and/or is "private," and thus that Title II and the NJLAD are not implicated under the relevant case law. (Def. Br. at 13-17.) Plaintiff disagrees with this assertion and with Defendants' interpretation of the relevant case law. The Court finds it unnecessary to address these issues since, even if plaintiff were able to establish that The Right Stuff was a place of public accommodation, Plaintiff cannot meet his burden in responding to a properly supported summary judgment motion of pointing to evidence in the record from which a reasonable fact-finder could find intentional discrimination by Defendants on the basis of his race.

Assuming but not concluding that Plaintiff has established a prima facie case of discrimination, the burden shifts to Defendants to articulate legitimate non-discriminatory reasons for their actions. Defendants have clearly done this here. Once the defendant does so, the plaintiff then has the burden of pointing to evidence in the record from which a reasonable fact-finder could find that the proffered reason was in fact a pretext for unlawful discrimination, and that the defendant was motivated by "discriminatory animus." See St.Mary's Honor Center v. Hicks , 509 U.S. 502 (1993); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Fuentes v. Perskie, 32 F.3d 759, 763-64 (3d Cir. 1994); U.S. v. Lansdowne Swim Club, 713 F. Supp. 785 (E.D. Pa. 1989), affd., 894 F.2d 83 (3d Cir. 1990); Brounstein v. American Cat Fanciers Ass'n , 839 F. Supp. 1100, 1109, n. 9 (D. N.J. 1993). Despite these shifting burdens of production, Supreme Court precedent makes it clear that the burden of proof always remains on the plaintiff to prove intentional discrimination based on a protected classification. St. Mary's Honor Center, 509 U.S. 502. Merely reciting that a protected classification was the reason for a decision does not make it so. Billet v. CIGNA Corp., 940 F.2d 812, 816 (3d Cir. 1991). Plaintiff has not pointed to any evidence suggesting a racially discriminatory motive by Defendants.

Defendants assert that they terminated Plaintiff's membership in The Right Stuff in May 1995 because Plaintiff was rude and nasty to other members, exhibited unacceptable intrusiveness toward them, and saw nothing wrong with what he did. Plaintiff has not denied the facts underlying these assertions.

Plaintiff refused to accept Haan's rejection of him, when she decided not to return his phone calls. Plaintiff also refused to respect Haan's clear desire to guard her personal information, as shown by her inclusion only of a nickname and only her home phone number in her The Right Stuff biography. Plaintiff sought to discover Haan's full name, home address, work address and work telephone number in spite of her clear wishes. Plaintiff then called Haan and demanded to know why she had not returned his phone calls. (Pl. Dep. 14:14-17; 85:15-88:2; Ex. E at 4.)

Plaintiff claims in his opposition brief that he tracked Haan's work number down because he wasn't sure if Haan had gotten the three messages he had left on her home answering machine. However, in his deposition testimony Plaintiff admits that he knew he had called the right number and that the message on the machine had changed from the first to the third time that he called (Pl. Dep. 82:4-17.)

After Miller broke their second date, Plaintiff responded by sending hurtful and harassing e-mails. In the course of these e-mails, Plaintiff accused Miller of being a bigot and a liar, instead of simply accepting the fact that Miller owed him no explanation at all for her decision not to go on a second date with him. Plaintiff admits that Miller had given him no independent factual basis to believe that Miller had broken their second date because of his race. (Pl. Dep. 68:1-10.) Plaintiff's behavior toward both Miller and Haan clearly demonstrated that he was unable to accept rejection, an inevitable occurrence for individuals who participate in a dating service, regardless of their race or gender.

After hearing both members' complaints, which were followed by their terminations of memberships, and after determining that Plaintiffs rationalizations for his inappropriate conduct were inadequate, Defendants terminated Plaintiff's at-will relationship with them to prevent Plaintiff from harassing any more of their members. (Pl. Dep. 33:11-19; Touchings Cert. at para.5.) These were legitimate non-discriminatory reasons for Defendants' termination of his membership. Hall v. BioMedical Application, 671 F.2d 300 (8th Cir. 1982) (patient's disruptive and abusive conduct constituted a legitimate non-discriminatory reason for outpatient hemodialysis facility's termination of its relationship with him, despite nurse's use of racial epithet toward him); White v. Denny's, 918 F. Supp. 1418, 1425-29 (D. Col. 1996) (use of loud profanity by black restaurant patron was legitimate, non-discriminatory reason for restaurant to deny continued service); Maysonet v. Solis, 409 F. Supp. 576 (D.P.R. 1975) (failure to abide by the rules established for the benefit of all casino patrons was legitimate non-discriminatory reason for deprivation of services); Dhambers v. Omaha Girls Club, 629 F. Supp. 925, 932 (D. Neb. 1986) (pregnant black counselor's violation of the "negative role model" policy was legitimate non-discriminatory reason for her termination); Kearne Generating Sys. Pub. Serv. Div. v. Roper, 184 N.J.Super. 253, 261 (App. Div.) certif. denied, 91 N.J. 254 (1982) (NJLAD does not preclude the exercise of traditional management prerogatives).

Plaintiff's claims cannot survive summary judgment because Plaintiff has not pointed to any evidence to suggest that Defendants' legitimate non-discriminatory reasons for his termination were pretextual. Texas Department of Community Affairs, 450 U.S. at 259-60. Indeed, there is no evidence that Defendants terminated his membership in The Right Stuff due to his race. Plaintiff admits that The Right Stuff includes members of various races and that he has dated such members. (Pl. Dep. 126:9-11.) Plaintiff cannot demonstrate that non-AfricanAmerican/Native-American members were treated more favorably than he was treated. Defendants point out that they terminated the membership of a white male who complained that The Right Stuff and an African-American member were being manipulative regarding omitting race from membership materials. (Touchings Dep. 39:2-24; 51:16-21.) When asked at his deposition to state the basis of his race discrimination claim, Plaintiff merely expressed his assumption, without any evidence, that once Defendants heard from Miller that he had "called her a bigot ... that was the end." (Pl. Dep. 10 1: 1-6.) At most, this may constitute evidence that Defendants were aware of Plaintiffs race when they terminated his membership, not that they intentionally discriminated against him because of it. Plaintiffs allegations, which are based on his mere assumption, do not constitute evidence of discrimination, and are insufficient to rescue his claims from summary judgment. Richardson v. Nat'l Rifle Assoc., 871 F. Supp. 499, 503, recon. denied, 879 F. Supp. 1 (D.D.C. 1994).

Plaintiff tries to refute the legitimacy of Defendants' proffered reasons for terminating his membership by asserting that since "nothing sent to members of the dating service described any sort of policy on termination for alleged rudeness" or "for any reason whatsoever," he could not fairly be held to any policy regarding termination of membership. (Pl. Br. at 7-8.) First, Defendants do not have any obligation to place, and did not place, a notice regarding termination of membership in its materials. See Hall, 671 F.2d at 302 (termination of relationship with public accommodation upheld as non-discriminatory despite absence of rule prohibiting behavior resulting in termination of relationship.) Moreover, it should not be necessary for any organization, especially one composed of highly educated individuals who presumably possess common sense, to have to publish a rule stating that the memberships of those who are inconsiderate, intrusive, obsessive or hurtful will be terminated. This is especially true where, as here, the duration of the relationship between The Right Stuff and its members is not outlined in a contract, and is therefore at-will, and where the purpose of the organization is to introduce members to one another for prospective romantic relationships.

In an effort to create a genuine issue of material fact to survive summary judgment, Plaintiff repeatedly points to Defendants Touchings' deposition testimony that, after his termination, Defendants knowingly admitted an accused rapist into their dating service, while excluding Plaintiff. (Pl. Br at 34.) Defendants respond that, upon hearing both sides of the story about this alleged rapist from the individuals involved, and after reviewing submitted documentation from the individual about whom the complaint was received, they determined that a former The Right Stuff member was being vindictive and fabricating an incident, in an effort to use The Right Stuff to hurt other individuals. Therefore, Defendants did not give credence to the accusation and did not exclude the accused individual from membership. (Touchings Dep. 159: 1-23; Krongard Cert.) Indeed, in that case, the individual accused of improper behavior, unlike Plaintiff, did not admit to engaging in behavior Defendants considered to be improper or fail to see the inappropriateness of such behavior. Given such explanation in the record and Plaintiff's failure to challenge it with evidence, the record cannot support a conclusion that Defendants' earlier decision to terminate Plaintiffs membership was a pretext for racial discrimination.

Plaintiff has failed to point to evidence that could show that Defendants' proffered legitimate non-discriminatory reasons for terminating his membership were actually pretextual in nature or motivated by discriminatory animus. Since Plaintiff has failed to meet this burden, Defendants' motion for summary judgment will be granted.[4]

In the Conclusion of their brief in support of the motion for summary judgment, Defendants request that the Court grant them "costs and reasonable attorney's fees." Plaintiff does not respond to this request. The Court has discretion in this action to award attorney's fees to the prevailing party. If Defendants choose to submit a motion for costs and fees, the Court would then entertain such a motion, after Plaintiff has been given an opportunity to respond.

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[4] Plaintiffs appeal of Magistrate Judge Chesler's March 4, 1998 Order denying Plaintiff's motions for the assignment of a new Magistrate Judge and/or District Judge due to bias or prejudice is presently pending before the Court. In light of the Court's holding that Defendants' motion for summary judgment will be granted, Plaintiff's appeal of Magistrate Judge Chesler's Order is moot as to any claims of bias or prejudice on the part of Magistrate Judge Chesler. As there were no claims in Plaintiffs motion that Judge Lifland was involved in any way in Plaintiff s allegations of bias or prejudice, there is no basis for the assignment of a new judge to this action. Plaintiff s appeal of Magistrate Judge Chesler's March 4, 1998 Order will be denied.

Dated: 5/7/98

John C. Lifland
United States District Judge

DAWNE TOUCHINGS. Sworn.

DIRECT EXAMINATION
BY MR. JACKSON:

Q Ms. Touchings, would you give your name and address for the record, please.
A Dawne Touchings, 254 Watchung Avenue, Glen Ridge, New Jersey.
Q Are you taking any drugs or any other medications which might affect your ability to understand my questions and answer them clearly?
A No.
Q Do you suffer from any mental or psychological conditions that might prevent you from understanding my questions and answering them clearly?
A No.
Q What sort of business is The Right Stuff? Is it a corporation or a partnership?
A It's a corporation.
Q Do you know when it was incorporated?
A In 1993.
Q Do you happen to know the month?
A June.
Q Who are the owners of The Right Stuff?
A I am.
Q You are the only owner?

A Yes.
Q Ms. Krongard doesn't have any equity?
A No, she doesn't.
Q You own 100 percent of it?
A Yes.
Q What is Ms. Krongard's role?
A She is no longer associated with The Right Stuff.
Q When did that happen?
A In March of this year.
Q Was she originally an equity holder?
A Yes.
Q And you bought her out?
A Yes.

Q When she was involved, that is, up until March of 1997 --- is that correct?
A Yes.
Q What was her role when she was involved?
A She did the computer work for The Right Stuff.
Q What percentage of the equity did she own?
A Fifty percent.
Q What was the division of labor between the two of you?

Touchings-direct 6

A She did all the incoming mail and input new members and changes to members in our database and I took the names and the numbers and I sent out the mailing to prospective members and I responded to calls. I did the incoming mail on Saturdays and I placed all the advertising and I produced all the month end reports that members got.
Q Who is doing Ms. Krongard's work now?
A I have an assistant.
Q What is the assistant's name?
A Mary Mooney.
Q How long has she been your assistant?
A She has been my assistant for two months.
Q So in the interim you were by yourself?
A Yes, with help from my mother.
Q Ms. Mooney I take it is purely an employee?
A Yes.
Q Does she have a title of some kind?
A No.
Q How often does she work?
A Each day.
Q Is it a 40-hour a week commitment?
A No. It's about 20 hours.
Q How much time do you spend on The Right Stuff?

Touchinqs-direct 64

A To the extent that violating the three that we identified before the break would more likely result in members having complaints about your behavior.
Q I's there something in here that says that?

A No, but common sense would tell you that it is more likely.
Q But there is nothing in this document which says that those instructions are more important than any others, is that right?
A There is nothing that says that, no.
Q So the only way for anybody to know that those instructions can result in termination of membership is your reference to common sense, is that right?
A Yes.
Q Is there anything in any of this material giving a person some idea as to grounds for termination?
A No.
Q Have you ever provided such a statement in writing to the members of the dating service?
A No. We have reinforced these observations in a newsletter occasionally about not contacting people.
Q Is that a document that I have shown you yet?
A No. It's a monthly newsletter that was

mentioned a couple of times. I'm not sure they still exist because I had some problems with the files getting disrupted but it was mentioned in newsletters occasionally.
Q Was it mentioned in any newsletters from September of 1994 to April of 1995?
A I don't know.
Q Did you send out these newsletters?
A Yes. They are received as part of the monthly mailing.
Q So you prepare them then?
A Yes.
Q And you don't recall sending out any news letters mentioning possible termination? Do you recall sending out any newsletters mentioning grounds for termination?
A Yes. I'm not sure when they were sent. Not grounds for termination but mentioning that you shouldn't contact people other than the way they indicated.
Q Are those statements any different from the statements in P-3?
A No.
Q So it is just more of the same?

A Right.

Touchings-direct 27

stated there as $50?
A Yes, exactly.
Q What was the status of my membership then as of May of 1995?
A We were going to bill you.
Q When did you came to that conclusion?
A in that billing for May of 1995.
Q But when did you came to the conclusion though?
A I guess it was -- wait a minute. I made a mistake. It was the billing prepared in April to be sent out at the beginning of May.
Q So just coincidentally at the same time Miller called to complain you were about to bill me?
A Yes, that's right
Q And you made that decision some time in April, correct?
A Yes, towards the end of April.
Q Do you have any stated policies on when you decide to bill people who are in this sort of optional situation in which you have not been billing them but reserve the right to do so?
A No. It is more judgmental.

Touchings-direct 43

your heads together and came up with the three strikes policy?
A Well, in response not so much to that but when I called him to discuss it with him he admitted that he had behaved inappropriately and he felt that there was some provocation and it was kind of clear that in some of these cases it was going to be like two different people's perception of reality.
It is difficult in some cases like this to determine whether the woman started the argument or the guy started the argument.
When you are put in that situation it is very difficult to be a judge of something that you didn't see and had no involvement with.

So we felt that for situations like that that a three strikes policy was reasonable because we viewed it in the sense of not having to judge the person's appropriateness but we also felt there would be some types of behavior that would be so inappropriate to the service that they wouldn't wait for the three strikes because that would be burdensome to our members.

Touchings-direct 44

was wrong.

It was just that if somebody's behavior was so inappropriate that he managed to offend three different people then there was something wrong and he wasn't meant for that kind of service.

Q Do you admit to having mentioned the three strikes policy to me in our May of 1995 conversation?

A Yes.

Q Why did you mention it to me then?

A Because after that when there was a situation where I actually contacted a member to discuss complaints I told him about the three strikes policy and I told him about the necessity that we intervene before three strikes if we think the behavior is very inappropriate.

Q No. My question is this: Why did you mention it to me?

A Because we had had complaints about you.

Q So you were applying the three strikes policy to me then and that's why you brought it up, is that right?

A Yes.

Q Now as part of the. policy on three strikes do you investigate the strikes to make sure that each one really counts?

Touchings-direct 155

A Yes.

Q That is not something you learned subsequently? You learned it when she complained about the behavior, right?'

A That she had indicated on the forms to be called at home, right, that I knew.

Q You knew that at the time?

A Yes.

Q When you decide to register some behavior as a strike in the three strikes policy does it matter whether you believe the allegation or not?

A No.

Q Do you just record it as a strike whether or not you think it is plausible? You said no but I hadn't finished my question at that point.

A Sorry. Would you repeat the question.

Q Yes. When you record something as a strike pursuant to this three strike policy does it matter whether you believe the story or not or do you just hear a complaint and you record it as a strike?

A That's right, yes. I try to be consistent. Like in this case it seemed similar to the general complaints about people getting a number from directory assistance and in your case, heard that you having found her through the legal directory as opposed to directory assistance.

Q And you decided that was not worth treating the matter as a strike simply because of precedent, because you had done that in earlier cases?

A Because we hadn't treated it as a strike we hadn't pursued it.

Q That's what I mean.

A Yes. It was those events that caused us to add this to this list.

Q You have to identify the document.

A Something like the variations of P-2, it was that kind of behavior that caused us to add this to enforce the way in which it appeared elsewhere in the material and we mentioned it in the newsletter about the same time as we got this complaint.

Q Now when you say "this" you are referring specifically to the fourth paragraph up from the bottom that begins with "Contact members using only the information provided in the bio" and "only" is in bold and underlined?

A Yes.

Q That's what you mean?

A Yes.

Touchings--direct 160

A We let him in the service.

Q Even though he had been accused of date rape you decided that?

A Yes.

Q Did you decide that the date rape didn't occur or simply that there was more of a relationship beforehand than she had said?

A Yes, that she had misrepresented the relationship and he had indicated that she was being very vindictive towards him.

Q Did you come to the conclusion that the date rape didn't occur or just that it happened after six months rather than after three days?

A We didn't come to any conclusion about whether it occurred or whether it hadn't occurred.

Q Did you count that as a strike?

A No, because it wasn't while this person was a member.

Q So an accusation of date rape didn't even merit a strike?

A We don't know whether it occurred so how can we do that?

Q You have told me earlier that you count things as strikes whether you believe the allegation or not.

Touchings--direct 161

A He wasn't a member of the service.

Q Didn't you tell me earlier that you count accusations as strikes-whether you believe the accusation or not?

A As long as the person is a member of our service, yes.

Q But behavior which took place before the person is a member doesn't count as a strike just because the person wasn't a member at the tine?

A If it can't be substantiated.

Q You have told me that you don't really care about the substantiation, you don't care whether it is true or not?

A If a person is not a member and there is nothing to indicate that what this person is saying is true.

Q You told me that that could generally be the case, that you would count it as a strike.

A You count it as a strike when it involves members. We don't want to be put in the position of having to decide which version of a member's story is correct. In this case the person was not part of our service, we were not involved in the incident when it occurred, there was nothing in what was given to us to indicate that it had or had not occurred.

Touchings--direct 162

Q I guess I don't see why the non-membership has any logical relationship to whether the thing counts as a strike or not. You say you count it as a strike if a person is a member and there is a complaint whether you believe the complaint or not, is that correct?

A Yes.

Q Why did it matter that the person wasn't a member at the time he was accused of date rape? Why do you care about that? Why wouldn't that count as a strike whether he was a member or not? Isn't he still just as much of a danger to the other members of the group?

A It was not clear that any of this occurred.

Q But you just said it is never clear that any of it occurred, you count it as a strike whether you believe it or not. That is true in every instance, is it not?

A As it pertains to members, yes.

Touchings--direct 104

here.

Q You don't doubt that that is her testimony, do you?

A I have no reason to.

Q Doesn't that testimony indicate that even Miller doesn't know why she gave up her membership in The Right Stuff?

A Well, it says here "You said you don't remember why you canceled. Do you remember what you told Ms. Touchings about why you were canceling?

ANSWER: No.

QUESTION: Did you call to complain about the E mail and tell her that you were counseling [sic: canceling] and you don't remember why you called to tell her you were counseling [sic: canceling]?"
She is not saying she doesn't remember why. She is saying she doesn't remember which one it was.
Q But you have said here and the sentence is "Because of Mr. Jackson's behavior both of these women gave up their membership in The Right Stuff".
A That's what I understood at the time.
That's what I read to her when I confirmed this part of it.
Q But that is inconsistent with what you just read, isn't it? She is saying "I might have given up my

Touchings--direct 105

membership because of the relationship with David Salak. I don't know. It might have been that or it might have been the E Mail."
A She is saying she doesn't remember at this point. I don't know. All I can say is that I read this to her and she maybe didn't understand or something. I don't know what was in her mind. She didn't object to this.
Q Again you make this much more complicated than my question.
My question is this: Is that statement consistent with this statement? That's all. I am not asking you what is in Miller's mind.
Is the statement that "both of these women gave up their membership in The Right Stuff because of Mr. Jackson's behavior" consistent with this statement?
A It is not inconsistent because she is saying it could be. She didn't remember.
MS. ESPOSITO: For clarity of the record I would like to point out that the deposition was June 10, 1997 and the document which Mr. Jackson is pointing to is dated November 27, 1995.
Q But forgetting about the possibility that she is remembering incorrectly or something, that statement is inconsistent with your assertion that she knows why

Touchings--direct 148
Q Why do you think it is not Miller since

you said earlier that they both canceled their memberships because of me? You said that in your document which we have identified as P-5.

You might want to refer to that. It is on the second page.

The statement is, "Because of Mr. Jackson's behavior both of these women gave up their membership in The Right Stuff."

A Can You *ask your question again?

Q Yes.

My question or my original question was this:

How do you know which one you are referring to here? You said it is probably Frankie.

My question is why is it probably Frankie given that you said they both dropped out in P-5?

A She didn't indicate any other reason that she would be dropping out.

Q How do you reconcile those two statements, the statement in P-8 that only one dropped out and the statement in P-5 that they both dropped out?

A As I said, I talked to Liz and I asked her whether what I wrote there is a reasonable representation of what she remembered happened and she said yes.

Q I don't think that is responsive to my question. These are both directly or indirectly your statements, are they not?

A Yes.

Q That's P-5 and P-8?

A Yes.

Q Why is it that you say in one that they both dropped out and you say in the other that only one dropped out? Don't tell me Liz approved it. I am asking you why did you say this?

A I am not sure.

Q But you say that the reference in P-8 is probably to Frankie, is that right?

A Yes, I guess so.

Q And you have some doubts as to whether you are referring to Miller because Miller may have expressed two reasons for dropping out of the dating service?

A That might be it.

Q When you say she expressed two you mean she expressed two to you at the time she decided to drop out, not that you heard that later on in the litigation?

A Right.

Q So when she was calling you back in April of 1995 she may have expressed two different reasons for dropping out, April/May 1995?

A I think so. Let me clarify that. I'm not sure that she expressed it but she did indicate that there was somebody that she was seeing. So she may have had more than one reason.

Q And she told you this back in April-May 1995?

A Yes, she told me because the other part of the objection that you had to her was the story of this person.

Q Would you turn to Page 6.

A Yes.

Q The second Paragraph 3, the one just up from the bottom of the page which begins with "One member who agreed to spend a weekend."

Do you see that?

A Yes.

Q That's the story you told me earlier. I think about one member being physically aggressive or was that another story?

A No. This is it.

Q This is the same story?

A Yes.

Q So when you say here that the member was

A I think it was very short. I think that's all it said.

Q Why didn't you keep a copy of that E-mail?

A it wasn't as stunningly off the mark as the first one. I mean, frankly, the second one made sense. Well, you know, if things are going well with David, I should cancel.

Q You say you don't remember why you canceled. Do you remember what you told Ms. Touchings about why you were canceling?

A No.

Q But you called to complain about the E-mail and to tell her that you were canceling, and you don't remember why you were calling to tell her you were canceling. It might have been the E-mail or it might have been David or it might have been something else?

A No. There's nothing else it could have been. It was one or the other. I don't remember which it was.

MR. JACKSON: No more questions.

THE
RIGHT
STUFF

An Introduction Network P.O. Box 873, Upper Montclair, NJ 07043

HOW TO JOIN: KEEP THESE INSTRUCTIONS!

1. Read HOW IT WORKS.
2. Fill out the biography form that is provided. Prepare a short profile on the form provided,
3. Complete the questions at the bottom of the short profile.
4. Keep copies of the blank and completed short profile and biography.
5. Mail your completed biography, proof of graduate or faculty status from eligible school(s), bio and short profile form, fee for membership, photos (optional) and fee for photos ($5):

The Right Stuff Inc
P.O. Box 873
Upper Montclair, NJ, 07043

6. Look forward to your monthly mailing.
7. The rest is up to you! Order bios, contact members, enjoy!

HOW IT WORKS

In order to become part of The Right Stuff data base, you will complete a short profile (30 words or less) that highlights all your vital information. You will also complete the one page biography form that includes more detailed information about your interests and preferences. You have the option of providing photos for distribution with your biography. Keep copies of the blank and completed forms. These will be convenient for making revisions to forms and for responding to members who require written responses.

The short Profile will be included in the monthly mailings received by members of the opposite sex. Members will be identified by a membership number rather than by name.

After identifying those short Profiles that appeal to you, send us their membership numbers on a form that we will provide. We will mail you copies of the biographies that you requested. You may also receive photos if the member(s) has provided them. You can then contact the members that you wish to meet. Members will specify on the biography if they prefer to be contacted by mail or phone. Please comply with their wishes.

Each month you will receive the short profiles of new and renewing members as well as any deletions from the list that may occur. You will also be informed if members request temporary suspension of membership.

The regular fee for The Right Stuff is $60 for a six month's membership (undergraduates, class of 1990 and later, as well as full-time graduate students pay only $25). Payment of the membership fee is due when you send your completed forms. There will be a $3 charge for each biography requested. Changes to your biography or profile will also cost $6. There is no charge for changing addresses, phone numbers, marital status or age. Replacement of monthly mailings costs $4. Please make checks payable to The Right Stuff.

When renewing your membership it is not necessary to complete new forms or write a new profile unless you wish to do so. There is no charge for a membership being temporarily suspended but you must inform us in writing or by phone of your wish to suspend and to resume your membership!

You must provide evidence of your graduate or faculty status from eligible school(s). Examples of suitable documentation: a copy of your diploma, a fund raising letter addressed to you, a copy of your listing in the school alumni directory, membership in your alumni club, or a copy of the cover of your alumni magazine with your address label intact.

Photo Distribution (Optional): Send us ten photos (or Multiples of 10) with your membership number (or name) on the back of each. They must fit in a number 10 business envelope. These will be distributed with the biographies. When we have five photos left, we will notify you, giving you the option to provide ten more. There Is a $5.00 charge for every ten photos. Please enclose payment when you send your photos.

The Short Profile:

Provide a short profile of 30 words or less (no more please) on the forms provided. Please be sure to include the school(s) from which you graduated, your age, marital status, height, religious preference (if applicable) and locality. These will count its two words. Because there are separate monthly mailings for men and women, there is no need to indicate your gender in the text of the profile. We do not want to inhibit your creativity but we reserve the right to edit profiles exceeding the specified length. If you have religious preference, please specify it in the short profile. Keep a copy of the short profile as a reference in case you wish to change the information. Some examples to help you get started:

Penn '72, 38, 5'10", divorced, advertising creative director, fit, kind, curious, perceptive, likes rock climbing, cross country skiing, jazz, foreign films. PHILADELPHIA

Radcliffe '70, 45, 5'4", divorced, two teenage children, psychiatric social worker, slim, good-looking, extroverted and funny, serious Celtics fan, love gardening, photography, and classical music, non smoker. Religious preference: Catholic. BOSTON

Please complete the questions on the bottom of the short profile form. These will help us provide special listings and plan new services for you.

The Biography:

Fill out the attached biography. Write legibly and in black ink because your original will be used to make copies. Please be sure to indicate if you prefer to be contacted by mail. phone or both. If you are concerned about giving out your last name, home number and/or address, feel free to provide only your first name, work and/or home phone numbers. If you provide an e-mail address, be sure to provide other information by which to contact you. Should you choose to provide only your first name and phone number(s), provide your name, address and phone number(s) in the space provided. This is necessary for administrative purposes. Make copies of this biography for contacting members and as a reference in case you wish to change the information.

it's before an administrative judge.

Q. Do you know the name of the administrative law judge?

A. I think it's Rebecca Dickinson.

Q. Do you self-identify yourself as black?

A. Yes.

Q. Like on forms, you actually write 1 am black?

A. If I have -- yes, I write that. Sometimes 1 write African American/Native American if there's a space to fill in.

Q. Have you, in fact, had to fill a document out like that for the Department of Justice?

A. I can't remember whether I did or not.

Q. Okay.

1 want you to go back to the very beginning of this deposition where we talked about your race and how you are what you are.

You stated that both your parents are half African American?

A. No, I didn't say half. You asked me if it is half, I said it's more complicated than that. And there is no way to say exactly what the

percentages are. But my parents are both African American and Native American.

If you go back to your mother's parents can you tell me what your mother's father is and mother's mother is?

A. My mother's mother was Native American. She's dead. And my mother's father was African American. But even that isn't the end of the story, but that's roughly what they were.

Q. What about your father's mother and father?

A. It's hard to say. They're both African American and Native American and maybe some other things. But it's less clear there.

So each of your father's parents was both a mixture of
A. Right.
of African American and Native American?
A. Right, as far as I know.
Q. Do you possess a copy of your birth certificate?
A. I have one. Not with me.
Q. I would make a request that you provide me a copy of your birth certificate please.

calling. I believe that The Right Stuff got that complaint and on the basis of what Miller said, which is he's not white and he called me a bigot, that they decided to terminate my membership without even contacting me. And had I not called Krongard at home, they would never had contacted me. Based on Miller's report alone they would have terminated my membership. And from that point on they were hiding behind the post office box and 800 number with the intent to never say anything to me.
Q. What was the date of your registered mail that you say is dated May 13?
A. I'll have to look at it to be sure, but is roughly what we're talking about.
Q. And Dawne Touchings ultimately called you, didn't she?
A. Right. She ultimately called me weeks after the initial contact. Remember, I started calling the first few days of May.
Q. As late as May 5, May 6, May 7 you say?
A. Right. There was a second phone call a few base later. Then there was registered mail. Then I got their home numbers and called Krongard at

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home. And a man answered the phone and he didn't seem to need much explanation from me as to who I was. I told him that I wanted to contact one of members of The Right Stuff. And he assured me I would get a response. And a few days later Ms. Touchings called me. In fact, it might have been the next day.

Q. What do you mean he didn't need to know who you were?

A. I told him who I was and started to explain my connection to Paula Krongard. Mainly, I'm a member of this dating service, she runs the dating service. He didn't need to hear that. He just said, okay, you will get a response. And that was the message that -- that was the end of my message with him.

Q. He said that without you saying that you haven't gotten a response previous to that?

A. I might have said that. But he didn't seem to need to know who I was or why I was calling I simply said I'm a member of The Right Stuff. I am Wagner Jackson. And as I was maybe one third of the way through what I intended to tell him to identify myself he said, I will get you a response.

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Q. Did Ms. Touchings tell you why she terminated you? In fact, did Ms. Touchings tell you she terminated you?

A. In the initial phone call she said I haven't sent you your message because we have gotten these

Q. Your mailing you mean?

A. Monthly mailing. Because we've gotten these complaints. I argued with her that what I said to Miller I had every right to say. And that 1 hadn't -- I didn't object to her concern about my calling Haan at work. But there was no reason for me to believe that was a reason to be kicked out of the dating service. And also there was no reason for me to believe Haan frankly objected to being

called at work other than the fact she's only given a home phone number.

Ms. Touchings then said, you haven't paid us. I said, what do you mean, I haven't paid you? She said, you haven't sent us these payments we expect to get every few months from members. I said, well, my understanding is that had been waived for residents of Washington, D.C. but if she was charging people for this, I would make that payment as well. That was the end of the conversation.

Q. Did you threaten to sue her for withholding services?

A. I said I would take my case to the New Jersey Division of Civil Rights.

Q. Did you say she was improperly withholding services?

A. Yes.

Q. And did she respond about the fees -- did she talk about the fees in response to that statement of yours?

A. I'm not sure that I can tell you what exactly she was responding to. I can tell you she brought up the fees at the end of the conversation after she had gone through Miller and Haan. And I

told her there was -- she had also brought up the three strikes policy. And I said I don't consider either one of these things to be a strike. There's nothing in the membership material indicating that there is any such three strikes policy.

My contact with Miller was perfectly legal and appropriate and it's not a legitimate basis for one of these strikes. And same is true for Haan.

1 did say in the future I will only call people at whatever information they leave. But I had no reason to believe that that contact -- I had no reason to believe Haan objected to being called at

work or that The Right Stuff would terminate peoples membership for that behavior. But I said in the future I will conform to that rule. And moreover, even by your own count that is only two strikes. At that point she said, well, you haven't paid us our fees so I am terminating -- I'm considering termination of your membership. She didn't actually say she had decided to terminate at that point.

So basically, we went through Haan and Miller. She had apparently decided that was not a legitimate basis for terminating the membership. So she made reference to this ridiculous non-payment of fees argument.

Q. When you say you went over Haan and Miller, what was the substance of your conversation?

A. She said we've gotten complaints from two members of the dating service. I think she identified them by name. And she started with Haan 1 believe. Said you called her at work and that she had only given her home phone number. I said, yes, that's true.

Q. Did you relate to her how you had obtained the work number?

A. I don't think so. I don't think so. Because she didn't ask. And my response to that was well, I don't think there's anything particularly objectionable about this, but in the future I will not contact people using information not on the bio.

Q. Did Ms. Touchings tell you that Ms. Haan was upset by this?

A. She probably did.

Q. And that she may have terminated her membership because of it?

A. I'm not sure about the last part. She told me Haan was upset. May have told me Haan terminated for that reason but I don't remember.

My response to that was I don't see anything particularly objectionable about this given Haan's bio. But in the future, you know, I'll conform to this rule.

Then with regard to Miller I was absolutely adamant that my contact with her was perfectly acceptable that she had no basis for terminating my membership on that basis. And if she persisted in terminating my membership on that basis, I was going to bring an action against her in the New Jersey Division of Civil Rights.

At that point she said, alright, you haven't paid us your fees and explained she was now is charging people in the Washington area every three months or every four months just to stay in the membership. And the initial materials actually make reference to such a fee. But she wasn't charging me that. I never got a bill. My understanding was that had been waived for people in Washington.

And the end of the phone call was her saying she was going to check on whether I had paid all fees that were due. I said, if you are charging people in Washington this fees, then I'll

pay it. She said, since you're not a fee paying customer we have no obligation to you. That was the end of the phone call.

Q. With regard to your conversation about Miller what did Ms. Touchings say to you about Ms. Miller, if anything?

A. That she was upset about my contact - Miller was upset about my contact with her. I don't think she went into any other details about the contact with Miller. Just that Miller was upset. And I didn't need to hear the details because I knew what I had said to Miller.

Then she explained that she has this three strikes policy. And I objected to her -- I objected to either one counting as a strike. I adamantly objected to counting the Miller interaction as a strike because I am entitled to say what I think to anybody. With regard to Haan, 1 said I don't think this should really count as a strike because there's nothing in your material saying anything about this three strikes policy. There's nothing in Haan's bio which says she can't be called at work. But in the future I will not violate this rule.

Q. But you did say the membership

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materials stated that you should contact the people by the means that they have listed?

A. It says please do that. But it also says please write in black ink. Now is writing in blue ink one of the three strikes that could get you terminated? The fact that the statement is in there doesn't mean they're going to kick you out for violating it. There is nothing in the material on the three strike policy. Nothing saying your membership could be terminated for violating the request, it's just a request. Not, obviously, more important than the request to write clearly and use black ink.

Q. Membership materials don't have to say you can be terminated for punching out your date for people to know you shouldn't be doing that.

A. I agree. I don't agree they could get away with not saying you can have your membership terminated for calling somebody at work because she left her home phone number.

Q. Did you explain to Ms. Touchings how you got Frankie's number.

A. I don't think she asked that.

Q. But did you explain it to her?

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don't know that. So the answer to your question is there is no independent evidence dealing purely with the subject of gender.

1 included gender just because I don't know

exactly how they discriminated, purely on the basis of race and they would have done the same thing had 1 been a woman but all the other facts were the same or whether my being a man who's not white was important.

Q. Do you think any woman was more favorably treated than you?

A. Again, I don't know there is a comparable situation but I don't have any evidence one way other.

Q. What was the reason that Dawne Touchings gave you for potentially terminating your membership?

A. At the end of phone call it was non-payment of fees.

Q. Did she say that it was also based upon the complaints of other members?

A. That's how she started the conversation. I then told her that I didn't think there was any basis for terminating my membership based on the allegations regarding Haan. I also told her that

in the future I would conform to that rule. That appeared to satisfy her in the sense that we then went on to Miller.

1 then told her my conduct with Miller is entirely protected. And, in fact, I was angry about the fact that she would even consider that to be a basis for terminating my membership. I have the right to call Miller a liar since she is and has pretty much admitted to it, and a potential bigot. She then seemed to accept that and moved on to the nonpayment of fees issue. So by the end of the telephone call, any doubt about the continuation of my membership was based on this fees issue.

Furthermore, Complainant's allegation that the number and nature of the complaints against him were insufficient to justify the termination of his membership is without merit. Complainant claims that Ms. Touchings stated, that the Service adhered to a "three complaint rule" or that three complaints were necessary before an individual's membership would be terminated. He, therefore, maintains that the two complaints against him did not warrant the termination of his membership. Although the Service has generally informed members about which complaints had been received that their memberships will be terminated after up to three complaints, that "policy," of course, depends, and has depended, upon the nature of the complaint and the individual circumstances. This was explained to Complainant. As indicated by its history of complaints and terminations of memberships, the Service has not strictly adhered to such a rule either before or after the incidents involving Complainant. Indeed, the Service's failure to adhere to such a rule with Complainant was not discriminatory on the basis of race or sex as the Service had terminated the membership of other non-African-American and/or

5 There is no question that both women who complained about Complainant were understandably upset by his conduct toward them. Both complained to the Service and one cancelled [sic] her membership because of Complainant.

1. Defendants' Reasons For Terminating Plaintiff's Membership in The Right Stuff Were Legitimate And Non-Discriminatory.

Defendants terminated plaintiff's membership in The Right Stuff in May 1995 because plaintiff, apparently unable to accept rejection, was rude and nasty to other members, exhibited unacceptable intrusiveness toward them, and saw nothing wrong with what he did.

In the first instance, plaintiff refused to accept Haan's **rejection** of him (her decision not to return his calls) and her **obvious** desire to guard her personal information (she had included only a nickname and her home phone number on her biography -- the document on which Right Stuff members are supposed to obtain their contact information), sought to discover Haan's full name, home address, work address and work telephone number in a way which suggests a **stalking obsession**, and demanded to know why she had not returned his calls -- a signal to most in the dating community that the receiver of the message is not interested. (Pl. Dep. 14:14-17; 85:15-88:2; Exh. E p.4 114,122) . In the next instance, after having a single date with Miller, setting up a second date, having that date cancelled [sic] due to an attempted suicide in Miller's family, and being told that Miller **did not wish to see him again** due to her relationship with another, plaintiff needlessly

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Wagner D. Jackson, Jr. : UNITED STATES DISTRICT COURT
: DISTRICT OF NEW JERSEY
Plaintiff, : Civil Action No. 97-0555(JCL)
V. :
The Right Stuff, Dawne : CERTIFICATION OF
Touchings and : DAWNE TOUCHINGS
Paula Krongard :
Defendants. :

DAWNE TOUCHINGS, of full age, certifies and says:

1. 1 am the current sole owner of The Right Stuff, Inc., a defendant in the above-captioned matter, and fully familiar with the facts outlined herein. I make this certification in support of defendants' motion for summary judgment.

2. In or about December 1994, Francoise Haan, an individual who had been a member of The Right Stuff from about June of that year, called me to complain regarding the behavior of another Right Stuff member, Wagner Jackson, the plaintiff in this matter (hereinafter "plaintiff"). At that time, Ms. Haan also asked to terminate her membership in The Right Stuff.

3. In or about April 1995, Dorothy "Liz" Miller, a member of The Right Stuff from about April of the prior year, called me to complain regarding the behavior of plaintiff. At that time, Ms. Miller also asked to terminate her membership in The Right Stuff.

4. 1 investigated the complaints against plaintiff by discussing them with Ms. Haan, Ms. Miller, and plaintiff in or about May 1995. I concluded at that time that plaintiff's communication with Haan at her work was more serious than I had originally thought since I discovered that she had not provided any information, including her name, which would have allowed plaintiff to easily be able to contact her at work. I further concluded that Miller had not done anything wrong, and that plaintiff's conduct toward her after her rejection of him was

inappropriate.

5. Given plaintiff's poor judgment, his inappropriate behavior toward other Right Stuff members, and his failure to recognize the inappropriateness of his behavior, I was greatly concerned that plaintiff's behavior would continue and potentially endanger the well-being of my members, as well as the goodwill of The Right Stuff.

6. Based on the above, defendant Krongard and I decided to terminate plaintiff's membership in The Right Stuff at the end of May 1995. We did not know plaintiff's race at this time.

I declare under penalty of perjury that the foregoing statements made by me are true and correct. I am aware that if any of these statements are willfully false, I am subject to punishment.

/s/
DAWNE TOUCHINGS

DATED: January 14, 1998

COUNTERSTATEMENT OF THE CASE

In February 1997, Plaintiff-Appellant pro se Wagner D. Jackson, Jr., Esq. ("Jackson"), a resident of Maryland, filed a complaint in the United States District Court for the District of New Jersey claiming that Defendant-Appellees The Right Stuff, Inc. (a dating service operating out of New Jersey) and its then owners Dawne Touchings (hereinafter "Touchings") and Paula Krongard (hereinafter "Krongard") (hereinafter collectively "The Right Stuff') discriminated against him based upon his race (African American/Native American) and/or gender in violation of 42 U.S.C. § 1981 ("§1981"); Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a. et seq. ("Title II"); and the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1, et seq. when it terminated his membership in the dating service in or about May 1995. SA 124-126 (Complaint).1 The Right Stuff, however, terminated Jackson's membership, not based upon Jackson's gender or race, but on his refusal to follow its rules, his offensive overreaction to other members' rejection of him, and his failure to recognize the impropriety of his conduct.

On or about June 26, 1997, Jackson filed a motion for sanctions against defense counsel for what he deemed to be "discovery abuse." (App. 255-257).2 Magistrate Hedges denied Jackson's motion on September 8, 1997 (App. 50-51), and the District Court denied the appeal of Magistrate Hedges' denial on October 23, 1997 (App. 52-55).

1 References to the Supplemental Appendix submitted by Appellants are designated as -SA" and the applicable page number.

2 References to the Appendix submitted by Plaintiff-Appellant are designated as "App." and the applicable page number.

B. The District Court's Violation Of The Legal Standard For Summary Judgment

The 7 May 1998 opinion granting summary judgment rests entirely on the conclusion that there is insufficient factual evidence of racial discrimination to justify a jury trial, thus expressing the district court's rejection *sub silentio* of every one of defendant/appellee's legal arguments. Appendix at 20-21 ("The Court finds it unnecessary to address these issues ...")[5] Consequently, the 16 page opinion is essentially nothing but a review of contested material facts set against the standard for summary judgment, and these 16 pages of "fact-finding" contain 14 major misstatements of fact, six minor misstatements, and two literally accurate but completely misinterpreted statements of fact. The opinion is riddled with falsehood.[6] Indeed, it frequently appears that the district court did not even read plaintiff/appellant's brief opposing summary judgment.[7]

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[5] Defendants argued that The Right Stuff is a "private club" not regulated by civil rights laws at all, and they challenged the appropriateness of the particular federal and state civil rights statutes selected by plaintiff. Their arguments are frivolous, but it is still odd that the district court ignores the contested legal issues in this case. One would think that the district court would first explicitly address whether any civil rights laws apply to defendants' behavior, and, if so, which ones. Perhaps the district court was simply in a hurry. But see infra at 15-21.

Also, it is strange that the district court ignores legal issues that it must address to even reach the factual analysis while wasting two pages of 16 page opinion addressing a phantom gender discrimination argument which plaintiff/appellant has never made and explicitly disavowed in the summary judgment opposition brief. Appendix at 345, n.11. Whenever the district court had no choice but to decide an issue in favor of the plaintiff, it left the matter unaddressed and thereby decided sub silentio. But whenever the district court could explicitly decide a matter against plaintiff/appellant, it did so, whether plaintiff actually made the argument or not.

[6] For example, the district court concludes that plaintiff had no "independent factual basis" to believe that Miller broke the second date due to race. Appendix at 16, 22.

One of plaintiffs trial exhibits is polling data collected by researchers at the University of Michigan in a book called "The Day America Told The Truth: What People Really Believe About Everything That Really Matters" (1991) by James Patterson and Peter Kim. Appendix at 290-300. This evidence shows that 77% of white Americans admit refusal to even consider a romantic relationship with a black person. Appendix at 294. If 77% of white Americans admit this, then the actual percentage who think this way is probably even higher; and if more than 77% refuse to even consider the idea, then the percentage who consider it but still discriminate is probably higher still. The district court's reference to an "independent factual basis" for accusing Miller of racial discrimination suggests an "out of touch with reality" quality that sometimes makes judges inferior fact-finders in comparison with juries. Of course, Miller's racial discrimination in dating is not illegal. But plaintiff could also reasonably conclude and then say to Miller that she broke the second date due to race even absent any additional information regarding Miller herself.

Yet there is plenty of supporting evidence regarding Miller herself in the form of freakish inconsistencies in Miller's constantly changing series of excuses. See infra at 14 (The most persuasive evidence of racial discrimination ... is proof that [the] carefully selected excuse for the alleged discrimination is a lie.) Presumably, Miller was careful about selecting her excuses when she signed her affidavit and when she testified during her deposition, even if she was careless when she was merely talking to plaintiff and exercising her right to engage in racial discrimination and then lie about it. Plaintiff presented this evidence of Miller's discriminatory animus to the district court (Appendix at 343-44, n.9), and the district court's summary judgment opinion ignored it because the evidence conflicts with John Lifland's personal presumptions and biases and the ideology that made him attractive to the Reagan Administration.

[7] For example, the district court concludes: "After hearing both members' complaints, which were followed by their terminations of their memberships ... defendants terminated plaintiffs [membership]." Appendix at 22-23. The district court suggests here not just that the terminations incidentally followed but that they were caused by plaintiff and that this justified termination of plaintiffs membership "to

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prevent plaintiff from harassing any more of [defendants'] members." Actually, Haan terminated her membership a month or two before plaintiff contacted her, and neither Haan nor Miller terminated their memberships due to plaintiff. Defense counsel asserted otherwise in their summary judgment brief (Appendix at 317, 328), and it appears the district court accepted this assertion as truth without even reading plaintiffs position. As plaintiff stated in the summary judgment opposition brief, Touchings has asserted under oath first the story that Haan and Miller terminated due to plaintiff and then (also under oath) the contradictory story that Haan alone terminated due to plaintiff. Appendix at 206-08, 341-42. Miller testified during her deposition that she does not know why she terminated her membership, and Touchings attended Miller's deposition. Appendix at 232. Touchings herself now says that plaintiff only cost them the Haan membership. Defendants also say Haan dropped out in December 1994. Yet plaintiff did not speak to Haan until late January or February 1995, so Haan could not have complained about plaintiff until at least a month or two after she had already dropped out of The Right Stuff. Appendix at 155-58.

A summary judgment opinion prepared with even minimal attention to the most important facts in this case would at least note the conflict on these matters.

6. From time to time, where necessary and appropriate, law clerks (summer associates) also performed work on this matter. Their hours and hourly rates are as follows:

Hope Goldstein	$65.00	35.75
Shane Freedman	$65.00	20.50
Jeanne Joyce	$65.00	11.00
Richard Garbarini	$65.00	2.50

7. In addition, Susan R. Schachman, a paralegal, performed 4.25 hours of work in 1997; her hourly rate in 1997 was $70.00.

8. Pursuant to a fee arrangement between GG&H and defendants, defendants were charged the applicable hourly rate for all work performed on this case and expenses. The time expended on this case (after significant cutting of bills and not counting a significant amount of work which was done in defense of plaintiff's claims in the New Jersey Division on Civil Rights and Office of Administrative Law), and defendants, expenses are reflected in the billing records, which are attached as Exhibit 1.

9. As reflected in Exhibit 1, from the period March 1997 to March 1998, total fees charged defendants in this case by GG&H were $81,878.75. Also reflected in Exhibit 1, defendants have incurred and have been charged expenses in the amount of $7,119.49 during the period March 1997 to March 1998. As of this date, defendant's outstanding unpaid balance is $56,157.47. In addition, defendants shall be billed approximately $2,850.00 plus associated expenses for the preparation of this application.

confirm that this was the person associated with the telephone number provided by the dating service, but this rather boring truth lacks the "maniacal obsession" factor which defendants seek to create from thin air.[8]

-- Paragraph 2 of page 4 asserts **in bold type** that none of the 12 to 15 people plaintiff dated went on a second date with him. Plaintiff initiated contact with all but two of these 12 to 15 people and had no second dates with most of them because plaintiff did not desire a second date with most of them and therefore did not call them back. Defendants are aware of this as a result of plaintiff's deposition, Jackson Deposition at 45, and there is no contradicting evidence. This false/misleading assertion is simply an attempt to mislead the Court.

ARGUMENT

Plaintiff has brought this case under 42 U.S.C. § 1981, 42 U.S.C. §2000a et seq., and the New Jersey Law Against Discrimination, N.J.S.A. 10: 5-1, et seq.[9]

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[8] Indeed. paragraph 2 of page 19 accuses plaintiff of having "a stalking obsession," and asserts that Haan's failure to answer calls at her home number is a signal to most in the dating community that the receiver of the message is not interested. Plaintiff would love to see the sociological research on "the dating community" which supports this assertion. Plaintiff, not being aware of the latest scientific findings in this area, just thought that Haan's answering machine might not be working.

[9] Defendant argues that §2000a and § 1981 do not address gender discrimination. This point is irrelevant. Plaintiffs reference to gender discrimination simply covers the possibility that The Right Stuff discriminates against non-Caucasian men but not non-Caucasian women. This too would be a form of racial discrimination, just like arresting black people for jaywalking and not arresting white people for jaywalking. A law prohibiting racial discrimination would not have to also explicitly mention jaywalking to cover such racial discrimination.

defendants to perform research and file several motions, including but not limited to issues relating to his refusal to comply with Rule 26 and other discovery procedures, threats of ethical violations for defending a deposition out of the jurisdiction, and listing defendants' counsel as a trial witness without a rational basis. Further, much of the work performed on defendants' behalf was performed by summer associates who bill at a much lower hourly rate than other GG&H attorneys. Since the amount requested is reasonable, defendants should be granted its costs and attorney's fees.

VI. Conclusion-

Based on the foregoing, defendants respectfully request that it be granted costs and reasonable attorney's fees as a prevailing party in this case.

Respectfully submitted,
GROTTA, GLASSMAN AND HOFFMAN, P.A.

FRANCINE ESPOSITO

DATED: May 26,1998

CONFIDENTIAL
JUDICIAL COUNCIL OF THE THIRD CIRCUIT
J. C. No. 98-42
IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
PRESENT: SLOVITER, STAPLETON, GREENBERG, SCIRICA, RAMBO, CAHN, ZIEGLER, THOMPSON and FARNAN,
Members of the Judicial Council of the Third Circuit

ORDER

In an Opinion and Order dated and filed on April 13, 1998, Chief Judge Becker dismissed the complaint in the above matter pursuant to 28 U.S.C. § 372(3)(A)(ii) on the grounds that the allegations of the complaint were directly related to the merits of respondent's decisions or procedural rulings.

Complainant filed a petition for review by the Judicial Council of the Third Circuit on April 24, 1998. The Judicial Council has considered the petition for review at a meeting of the Judicial Council at which all members were present and has concluded that the relief should be denied. Although several members of the Judicial Council had some question as to whether the complaint in this case should be categorized as directly related to the merits of respondent's decisions or procedural rulings, all members of the Judicial Council were agreed that the respondent did not engage in conduct which was prejudicial to the effective and expeditious administration of the business of the courts.

Pursuant to Rule 7, Rules of the Judicial Council of the Third Circuit with Respect to Complaints of Judicial Misconduct or Disabilily, it is therefore, ORDERED that the order of the Chief Judge is AFFIRMED.

The parties are notified that this order is final and conclusive and shall not be judicially reviewable on appeal or otherwise. See 28 U.S.C. § 372(c)10.

For the Council,

/s/ Dolores K. Sloviter [10]
Circuit Judge
DATED: December 11, 1998

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[10] Ranking eligible active circuit judge.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
MARTIN LUTHER KING, JR.
FEDERAL BUILDING AND COURTHOUSE
50 WALNUT ST. ROOM 2842
NEWARK. NEW JERSEY 071014999
(201) 645-3827

CHAMBERS OF RONALD J. HEDGES
UNITED STATES MAGISTRATE JUDGE

July. 14,1997

LETTER-ORDER
ORIGINAL FILED WITH THE CLERK OF THE COURT

Wagner D. Jackson, Jr.
2606 Finch Street
Silver Spring, MD 20902
Francine Esposito, Esq.
Grotta, Glassman & Hoffman
75 Livingston Avenue
Roseland, NJ 07068-1761

Re: Jackson v. The Right Stuff, et al.
Civil Action No. 97-555
Hon. John C. Lifland, U.S.D.J.

Dear Litigants:

I am in receipt of correspondence from plaintiff dated July 8,1997, and addressed to Judge Lifland.

All discovery is hereby stayed until oral argument on September 8, 1997. At that time I will address plaintiff's motion for sanctions and any other discovery-related motion which may be filed in an appropriate and timely manner by any party.

SO ORDERED.

/s/
RONALD J. HEDGES
UNITED STATES MAGISTRATE
JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MARTIN LUTHER KING, JR.
FEDERAL BUILDING AND COURTHOUSE
50 WALNUT ST. ROOM 2842
NEWARK, NEW JERSEY 071014999
(201) 645-3827

CHAMBERS OF RONALD J. HEDGES
UNITED STATES MAGISTRATE JUDGE

July 7,1997

LETTER-ORDER ORIGINAL FILED WITH THE CLERK OF THE COURT

Wagner D. Jackson, Jr.
2606 Finch Street
Silver Spring, MD 20902
Francine Esposito, Esq.
Grotta, Glassman & Hoffman
75 Livingston Avenue
Roseland, NJ 07068-1761

Re: Jackson v. The Right Stuff, et al.
Civil Action No. 97-555
Hon. John C. Lifland, U.S.D.J.

Dear Counsel:

I am in receipt of plaintiff's Motion for Sanctions. I will hear oral argument on this motion at 10:00 A.M. on September 8, 1997.

Defendant's opposition and plaintiff's reply shall be submitted in the manner prescribed by Local Civil Rule 7.1.

Plaintiff is advised to comply with Local Civil Rule 7.1 in all future motion practice. Moreover, inasmuch as my Chambers is not an "extension" of the Clerk, I will no longer accept any motion papers with the request that I have these filed.

SO ORDERED.

/s/
RONALD J. HEDGES
UNITED STATES MAGISTRATE
JUDGE

GROTTA, GLASSMAN & HOFFMAN, P.A.
Attorneys for Defendants
The Right Stuff, Dawne Touchings and
Paula Krongard
175 Livingston Avenue
Roseland, New Jersey 07068
(201) 992-4800
FE/9536

	: UNITED STATES DISTRICT
Wagner D. Jackson, Jr.	: COURT DISTRICT OF
Plaintiff,	: NEW JERSEY
	: Civil Action No. 97-0555(JCL)
v.	:
	:
The Right Stuff,	: **ORDER**
Dawne Touchings and	:
Paula Krongard	:
Defendants.	:

This matter having been opened to the Court by Grotta, Glassman & Hoffman, P.A., attorneys for The Right Stuff, Dawne Touchings and Paula Krongard (collectively "Defendants") and having been opposed by Wagner D. Jackson, Jr., Esq., Plaintiff Pro Se, and the Court having considered the matter and with good cause shown;

IT IS on this 5th day of January 1997

ORDERED that the December 31, 1997 deadline for serving/filing motions in this case, outlined in the Final Joint Pretrial Order dated November 24, 1997, is hereby extended until January 14, 1998.

/s/
HONORABLE STANLEY R. CHESLER,
U.S.M.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
MARTIN LUTHER KING, JR.
FEDERAL BUILDING AND COURTHOUSE
50 WALNUT ST. ROOM 2842
NEWARK, NEW JERSEY 071014999
(201) 645-3827
CHAMBERS OF RONALD J. HEDGES

May 1,1997

LETTER-ORDER ORIGINAL FILED WITH THE CLERK OF THE COURT

Wagner D. Jackson, Jr.
2606 Finch Street
Silver Spring, MD 20902

Francine Esposito, Esq.
Grotta, Glassman & Hoffman
75 Livingston Avenue
Roseland, NJ 07068-1761

Re: Jackson v. The Right Stuff, et al.
Civil Action No. 97-555
Hon. John C. Lifland, U.S.D.J.

Dear Counsel:

This will confirm our telephone conversation of April 28, 1997.

Plaintiff has elected not to serve written discovery requests on defendant. Defendant may serve Interrogatories and document requests on plaintiff. These are to be served not later than May 5, and are to be answered not later than June 5, 1997.

Plaintiff seeks to depose nonparty witnesses. Defendant wishes to depose plaintiff. These depositions (and all fact discovery) shall be completed not later than June 30, 1997.

Attached hereto is a form of Final Pretrial Order. Plaintiff shall be responsible for preparation of the Final Pretrial Order. Plaintiff and defendant are directed to consult and prepare a joint submission

I will conduct a pretrial conference at **1:30 P.M. on July 23, 1997**. If both plaintiff and defendant have executed the Final Pretrial Order and have delivered it to my Chambers I will conduct the pretrial conference by telephone. Defendant is directed to place the telephone call.

the pending Order to Show Cause is DISCHARGED.

SO ORDERED.

/s/
RONALD J. HEDGES
UNITED STATES MAGISTRATE

Orig.: Clerk
CC: Hon. John C. Lifland, U.S.D.J.
Addressees
File

GROTTA, GLASSMAN & HOFFMAN, P.A.
Attorneys for Defendants
The Right Stuff, Dawne Touchings and
Paula Krongard
175 Livingston Avenue
Roseland, New Jersey 07068
(201) 992-4800
FE/9536

Wagner D. Jackson, Jr.	: UNITED STATES DISTRICT : COURT DISTRICT OF
Plaintiff,	: NEW JERSEY
v.	:Civil Action No. 97-0555(JCL)
	:
The Right Stuff, Dawne Touchings and Paula Krongard Defendants.	: **ORDER TO SHOW CAUSE**

TO: Wagner D. Jackson, Jr., Esq.
2606 Finch Street
Silver Spring, Maryland 20902

This matter having been brought before the Court by Grotta,Glassman & Hoffman, P.A. (Francine Esposito, Esq. appearing),attorneys for The Right Stuff, Dawne Touchings and Paula Krongard (collectively "Defendants"), and the Court having considered the documents certification submitted herewith;

IT IS on this 14th day of April 1997:

ORDERED that plaintiff show cause before the District Court for the District of New Jersey, at the Court House in Newark, New Jersey on the 28th day of April 1997 at 10, why the deposition of Dorothy E. Miller should not be adjourned until such time as the parties comply with Rule 26 of the Federal Rules of Civil Procedure. All discovery stayed in interim.

/s/
HONORABLE RONALD J. HEDGES,
U.S.M.J.

*Court will conduct an initial conference on return date.

GROTTA, GLASSMAN & HOFFMAN, P.A.
Attorneys for Defendants
The Right Stuff, Dawne Touchings and
Paula Krongard
175 Livingston Avenue
Roseland, New Jersey 07068
(201) 992-4800
FE/9536

	: UNITED STATES DISTRICT
Wagner D. Jackson, Jr.	: COURT DISTRICT OF
Plaintiff,	: NEW JERSEY
	: Civil Action No. 97-0555(JCL)
v.	:
	:
The Right Stuff,	: **ORDER**
Dawne Touchings and	:
Paula Krongard	:
Defendants.	:

This matter having been opened to the Court by telephonic conference, with Wagner D. Jackson, Jr., Esq., Plaintiff Pro Se, and Grotta, Glassman and Hoffman, P.A. (Francine Esposito, Esq.) appearing, and the Court having considered the matter, and for good cause shown;

IT IS on this 7th day of July, 1997:

ORDERED that defendants produce to plaintiff the Right Stuff biographies (with names, addresses and telephone numbers redacted):

1) which were ordered by Dorothy Elizabeth Miller;
2) of two specific members requested by plaintiff, whom Ms. Miller dated;

ORDERED that plaintiff is not to contact current or former members of the Right Stuff or other individuals Ms. Miller dated and

ORDERED that the parties be allowed to use audio tape recorders at the depositions of plaintiff and defendant Touchings. Such recordings shall not be used by the parties except in connection with this matter, and the court reporter's transcript shall be the sole official record of such depositions.

HONORABLE RONALD E. HEDGES,
U.S.M.J.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790

P. DOUGLAS SISK
CLERK
TELEPHONE
215-597-2995

June 24, 1998

Honorable Stanley R. Chesler
Magistrate Judge
U.S. Post Office & Courthouse
Federal Square
P.O. Box 999
Newark, NJ 07101-0999

Wagner D. Jackson, Jr.
2606 Finch Street
Silver Spring, MID 20902

Re: In the Matter of a Complaint Against A United States Magistrate Judge Under 28 U.S.C. § 372(c),J.C. No. 98-42

Dear Judge Chesler and Mr. Jackson:

Pursuant to Rule 6(C), Rules of the Judicial Council of the Third Circuit Governing Complaints of Judicial Misconduct and Disability, notice is given that the Complaint, Chief Judge's Memorandum Opinion and order, and the Petition for Review have been transmitted to the Judicial Council today. You will be advised when an order is entered.

Very truly yours,

P. Douglas Sisk, Clerk

By /s/
Betty J. Robinson
Deputy Clerk

JUDICIAL COUNCIL OF THE THIRD CIRCUIT

J.C. No. 98-42

IN RE: COMPLAINT OF JUDICIAL MISCONDUCT
ORIGINAL PROCEEDINGS UNDER 28 U.S.C. § 372(c)

MEMORANDUM OPINION

(Filed: April 13, 1998)

PRESENT: BECKER, Chief Circuit Judge.

This is a complaint filed pursuant to 28 U.S.C. § 372(c) against a United States Magistrate Judge (respondent) on account of certain actions that complainant attributes to respondent in connection with respondent's pretrial management of a civil action in which complainant, a member of the bar and an experienced litigator, is proceeding pro se. The complaint is sourced in a problem with the completion of the final pretrial order which required joint participation of both parties, and which was delayed. It is not clear at this juncture as to whether one or both parties was responsible for the delay. At all events, respondent apparently believed that complainant bore some responsibility for the delay. In connection with his decision to reschedule a signature conference, respondent is alleged to have caused his clerk to deliver a message to complainant that complainant finds improper.

More specifically, complainant alleges that the judge's clerk warned him that respondent had a special private and personal message for plaintiff *pro se* that the clerk would convey *ex parte* later that afternoon. In complainant's submission., absolutely no such private personal "message" from a judge to a litigant with a case before judge can be justified on any grounds. He continues that

> the circumstances surrounding this message strongly suggest that it was a personal threat. Threatening both counsel with sanctions for missing a court deadline would not constitute judicial misconduct -- although,

again, the delay was caused entirely by defense counsel, and respondent was so informed -- but seeking *ex parte* contact with plaintiff later that afternoon to deliver a special personal threat is conclusive proof of both bias in fact and the appearance of bias. It is plainly judicial misconduct.

Complainant then suggests that respondent thought better of delivering said *ex parte* personal threat o him -- or simply would not leave such a message recorded on plaintiff *pro se 's* answering machine -- because he received no subsequent communication on this matter. He adds, however, that the fact that respondent originally sought such *ex parte* contact, and had his clerk so inform counsel, is threat enough and reason enough to assign this matter to another judge. Finally, the complaint thus goes on to complain of respondent's delay in a acting on complainant's motion for change of judge due to bias or prejudice pursuant to 28 U.S.C. § 144. That motion has, however, now been acted on -- and denied -- in an extensive written opinion.

The judicial misconduct statute provides a remedy if a federal judicial officer "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. § 372(c)(1). The chief circuit judge may dismiss a complaint brought under the statute if, after review, he finds that it is not cognizable under the statute, is directly related to the merits of a decision or procedural ruling, or is frivolous. 28 U.S.C. § 372(c)(3)(A)(i)-(iii).[1]

Having analyzed the allegations of the complaint, I find that they are directly related to the merits of respondent's decisions or procedural rulings, and that the complaint must, therefore, be dismissed under 28 U.S.C. § 372(c)(A)(11). While complainant, obviously a capable lawyer, couches his complaint in a manner disguised to avoid the "cut" of § 372(c)(A)(ii), on this record he cannot do so, for the complained of actions (which are stoutly denied or at least benignly explained by respondent in his opinion denying recusal), are at bottom procedural rulings. Accordingly, the complaint will be dismissed.

---

[1] Section 372(c)(3)(A)(ii), which provides for dismissal of complaints related to the merits of a decision or procedural ruling, reflects Congress's concern that a misconduct complaint not be used as a vehicle by which disappointed litigants may challenge judicial action or inaction occurring in the course of litigation which is reviewable by appeal or mandamus. The Senate Report states: "It is important to point out what subsection (c) does not mean; it is not designed to assist the disgruntled litigant who is unhappy with the result of a particular case." S. Rep. No. 362, 96th Cong., 2d Sess. 8 (1980), reprinted in in [sic] 1980 U.S.C.C.A.N. 4315, 4322.

/s/
Chief Circuit Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WAGNER D. JACKSON, JR.,

Plaintiff,

v.

THE RIGHT STUFF, DAWNE TOUCHINGS, and PAULA KRONGARD,

Defendants.

Hon. John C. Lifland
Civ. No. 97-0555 (JCL)

OPINION

Wagner D. Jackson, Jr., Esq.
2606 Finch Street
Silver Spring, MD 20902
Pro Se Plaintiff

Francine Esposito, Esq.
Grotta, Glassman & Hoffman, P.A.
75 Livingston Avenue
Roseland, NJ 07068-1761
Attorney for Defendants

CHESLER, MAGISTRATE JUDGE

1. INTRODUCTION

This matter comes before the Court on the motions of Plaintiff, Wagner D.Jackson, Jr. ("Plaintiff'), for the assignment of a new Magistrate Judge and or District Judge due to bias or prejudice, pursuant to 28 U.S.C. § 144, and for the disqualification of the Magistrate Judge, pursuant to 28 U.S.C. § 455. Plaintiff's motions were referred to the undersigned by the Honorable John C. Lifland, U.S.D.J. No oral argument was heard pursuant to Fed.R.Civ.P. 78. For the reasons set forth below, Plaintiff s motions will be denied.

II. BACKGROUND

Plaintiff Wagner D. Jackson, Jr., a United States Department of Justice trial attorney practicing law for over thirteen years, filed this action pro se on February 3, 1997, claiming that his membership in "The Right Stuff," a dating service, was terminated on the basis of his race and/or sex. Defendants, however, contend that Plaintiff's membership in The Right Stuff was terminated as a result of his improper conduct toward other members. This improper conduct allegedly included baselessly accusing one woman of being a racist and a liar after she declined dating him a second -time and using improper methods to learn the identity and work telephone number of another woman who failed to return Plaintiff s calls to her home.

In a letter order dated September 8, 1997, the Honorable Ronald J. Hedges, U.S.M.J., set a discovery deadline of October 31, 1997, and stated that a final pretrial conference in this matter would be held on November 12, 1997, at 3:00 p.m. Subsequent to this order, the undersigned was assigned as Magistrate Judge in this matter. Accordingly, the date for the final pretrial conference was changed to November 14, 1997.

On November 11, 1997, counsel for Defendants in this matter contacted the Court's law clerk by telephone and requested that the final pretrial conference be postponed briefly because they had not been provided with a draft of Plaintiff's proposed order. The Court's clerk informed counsel that it was not the practice of the Court to delay such conferences but that if there was a problem with the date to request the adjournment in writing.

On November 12, 1997, Plaintiff contacted the Court's law clerk by telephone and likewise requested that the final pretrial conference be postponed. Plaintiff mentioned to the clerk that an adjournment was necessary because defense counsel did not provide Plaintiff with a draft of their proposed order in a timely manner. The clerk informed Plaintiff that his adversary had called the prior day and requested an adjournment for precisely the same reason. In order to avoid confusion, the clerk requested that Plaintiff set up a conference call so that the matter could be discussed in full at one time.

The law clerk held a telephone conference with Plaintiff and defense counsel on the afternoon of November 12, 1997. At that time, both parties renewed their request for an adjournment of the pretrial conference. Defense counsel admitted that she was partially responsible for the delay but argued that both parties were at fault regarding the holdup. Plaintiff, however, disagreed strongly and stated that the delay was caused entirely by defense counsel.

Additionally, the clerk informed the parties of the Court's concern that the request for an adjournment was made at such a late date. The Court was not notified of a problem until less than two days before the scheduled conference was to take place. This was extremely late when considering that the parties admitted the problems existed at least two weeks before contact with the Court. The clerk informed the parties that these types of conferences were rarely adjourned but that their request would be passed on to the Court.

After consideration of the parties' oral request for an adjournment and Plaintiff's written request dated November 12, 1997, the Court reluctantly granted a ten day extension of the pretrial conference. The Court's decision was articulated to the parties during a short telephone conference with the law clerk on November 13, 1997. The clerk placed a call to Francine Esposito, Defendants' counsel, and asked her to connect Plaintiff into the call.

While Ms. Esposito was placing the call, the clerk informed her of a "message" from the Court. The message was that the Court was not happy in adjourning the conference, that this was not the Court's usual practice, and that on the adjourned date of the conference both sides would be expected to stay at the courthouse until a final pretrial order was completed if it had not been fully prepared in advance as the parties were directed to do.[1] At this time, Plaintiff was added to the call and the clerk informed him that he had a "message" to relay to Plaintiff on behalf of the Court. Because Ms. Esposito had been informed of the message (that adjourning this conference was not the Court's usual practice and that on the adjourned date of the conference both sides would be expected to stay at the courthouse until a final pretrial order was completed if it had not been fully prepared in advance as the parties were directed to do), the clerk told Plaintiff that it would be relayed at a different time.

With both parties on the line, the law clerk advised them that the Court had agreed to an adjournment of the conference. The clerk then worked with the parties to find a mutually convenient date and time that fell approximately seven to ten days after the original conference date. During this conversation, the clerk reiterated the "message'" that Ms. Esposito had already heard and the parties came to an agreement on a new date.

---

[1] Plaintiff claims that this Court threatened to "lock counsel in chambers" until the final pretrial order was entered. It is the practice of this Court to require a final order to be entered when counsel leaves. The parties in this matter were informed that they would be required to stay all day on November 24, 1997, and return on any subsequent days until a final pretrial order was entered.

Additionally, Plaintiff claims that Judge Hedges, the Magistrate Judge formerly assigned to this case, told Plaintiff that he need not appear in Newark for the final pretrial conference. While at first glance this is correct, Judge Hedges order dated September 8, 1997, stated that "[a]ssuming that all parties complete and execute the Final Pretrial Order and have it delivered to my Chambers beforehand, I will conduct the pretrial conference by telephone." In this case, no final pretrial order was ready at the time of Judge Hedge's scheduled conference with the parties or when the parties arrived on November 24, 1997. Judge Hedges, therefore, would have undoubtably required the appearance of the parties in Newark.

Because the clerk repeated the Court's message, no call was later placed to Plaintiff to inform him of the information. The clerk then disconnected himself from the call to allow the parties to continue to discuss the case.

Plaintiff did not receive any further communication from the Court concerning the adjourned pretrial conference. Plaintiff contends that he telephoned the Court's chambers on November 14, 1997, twice to receive the "message," but that the law clerk had yet to arrive at work. No messages were left and no communication between the Plaintiff and the Court occurred until the conference on November 24, 1997.

The final pretrial order in this action was executed on November 24, 1997, and was filed on November 25, 1997. Plaintiff subsequently filed a motion for the assignment of a new Magistrate Judge and/or District Judge due to bias or prejudice, pursuant to 28 U.S.C. § 144, on December 8, 1997.[2] Additionally, Plaintiff filed a motion for the disqualification of the Magistrate Judge, pursuant to 28 U.S.C. § 455, on January 5, 1998.

III. DISCUSSION

Plaintiff moves for the assignment of a new Magistrate Judge and/or District judge due to bias or prejudice pursuant to 28 U.S.C. § 144 and for the disqualification of the Magistrate Judge pursuant to 28 U.S.C. § 455. Defendants oppose both motions and argue that there is no reason to conclude that this Court is personally biased against Plaintiff or in favor of Defendants. Each argument will be discussed in turn.

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[2] Plaintiff filed a duplicate motion with Chief Judge Thompson in the Trenton vicinage. The two motions were consolidated and referred to this Court.

Plaintiff is also requesting that this matter be assigned to a different district judge. Plaintiff states that "[t]he incident described [in the papers submitted] does not involve Judge Lifland, but given the close working relationship between [district] judges and their magistrates, reassignment to a new [district] judge is to be preferred."

A. 28 U.S.C. § 144

Section 144 governs challenges to district judges and magistrate judges on the grounds of bias. That section states that

> [w]henever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

28 U.S.C. § 144. A party's request under § 144 must be made by motion to the judge accused of bias. The motion must be timely filed, must contain a good faith certificate of counsel, and include an affidavit stating material facts which, if true, would lead a reasonable person to conclude that the judge harbored a special bias toward the movant. United States v. Rosenberg, 806 F.2d 1169, 1173 (3d Cir. 1986), cert. denied, 481 U.S. 1070, 107 S. Ct. 2465, 95 L.Ed.2d 873 (1987).

A judge faced with a motion for disqualification under § 144 must accept the allegations of the moving party as true. United States v. Furst, 886 F.2d 558, 582 (3d Cir. 1989), cert. denied, 493 U.S. 1062, 110 S. Ct. 878, 107 L.Ed.2d 961 (1990) ; Mims v.Shapp, 541 F.2d 415, 417 (3d Cir. 1976). "[I]t is the duty of the judge to pass only on the legal sufficiency of the facts alleged to ascertain whether they support a charge of bias or prejudice." Id. In a §144 inquiry, the truth of the allegations and the good faith of the movant may not be questioned even if the judge has personal knowledge to the contrary. Id. The judge need not, however, consider any opinions or conclusory statements made by the movant. United States v. Vespe, 868 F.2d 1328, 1340 (3d Cir. 1989); United States v. Haldeman, 559 F.2d 31, 134 (D.C. Cir. 1976) (en banc) (per curiam), cert. denied sub nom. Ehrlichman v. United States, 431 U.S. 933, 97 S. Ct. 2641, 53 L.Ed.2d 250 (1977). The test, therefore, is whether, assuming the truth of the facts alleged. a reasonable person would conclude that a personal or extrajudicial, rather than a judicial. bias exists. Vespe, 868 F.2d at 1340; Mims, 541 F.2d at 417. Accordingly, if the alleged facts "give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment," the judge must recuse himself or herself. Vespe, 868 F.2d at 1340; United States v. Townsend, 478 F.2d 1072, 1073-74 (3d Cir. 1973) (quoting Berger v. United States, 255 U.S. 22, 33-34, 41 S. Ct. 230, 233 (1921)).

There is no question that Plaintiff's motion was timely filed. When measuring the timeliness of a § 144 motion, the court must focus on the delay that occurred between the events giving rise to the charge of bias and the filing of the recusal request. Smith v. Danyo, 585 F.2d 83, 86 (3d Cir. 1978). If the litigants take significant steps to invoke the participation of the court during this interval, then the motion is not timely. Shank v. American Motors Corp., 575 F. Supp. 125, 128 (E.D. Pa. 1983). In this case, the alleged bias became known to Plaintiff on November 13, 1997, and Plaintiff filed this motion on December 8, 1997. The fourteen business days between the event giving rise to the charge and the filing of this motion is certainly not a severe delay. Additionally, the parties did not contact the court for any reason during this interval except when appearances were made at the pretrial conference. Accordingly the Court finds that this application was made in a timely manner.

The Court now turns to the question of sufficiency. See Rosenberg, 806 F.2d at 1173. When evaluating a motion under § 144, the Court must accept as true the movant's factual allegations but may reject any conclusory statements. Vespe, 868 F.2d at 1340. In the instant case, Plaintiff asserts the following facts:

> During the week of 10 November 1997, plaintiff and defense counsel informed Magistrate Judge Chesler's clerk (William Clark[e], Jr.) that counsels' draft of the final pretrial order in this case would not be completed in time for the magistrate's signature, which was then scheduled for 14 November 1997. Plaintiff informed the clerk that this delay was entirely due to defense counsel's failure to meet Mag[istrate] Judge Chesler's intermediate deadline for defense counsels' draft. [] Defense counsel admitted to the clerk that she was partially responsible but argued that both parties were at fault regarding the delay. Magistrate Judge Chesler's response was conveyed to counsel during a teleconference with the judge's clerk on 13 November 1997. The response, as conveyed by the clerk, was that Magistrate Judge Chesler was very upset but would reschedule the 14 November signature conference to 24 November 1997. The clerk added Mag[istrate] Judge Chesler's threat to lock counsel in his chambers on 24 November until the order was finished if the order was not ready on time. [] The clerk also warned that Magistrate Judge Chesler had a special private and personal message for plaintiff that the clerk would convey to

> plaintiff *exparte* later that afternoon. [] Apparently, Magistrate Judge Chesler though (sic) better of delivering said *exparte* personal threat to plaintiff, because plaintiff has received no subsequent communication on this matter. Plaintiff called chambers twice the next day to receive this personal message and was told that the clerk had not yet arrived for work.

See Plaintiff's Affidavit. para. 3-5.

It is unlikely that these facts would lead a reasonable person to conclude that I harbor a special bias toward Plaintiff or in favor of Defendants. See Rosenberg. 806 F.2d at 1173. First, if an ex parte communication had taken place between this Court and Plaintiff, this alone would be insufficient to merit recusal. See Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36, 41 (4th Cir. 1995) (an isolated exparte communication alone is insufficient to merit recusal); In re Kaminski, 960 F.2d 1062, 1065 n.3 (D.C. Cir. 1992); (same); Aiken Counly v. BSP Div. of Envirotech Corp.,866 F.2d 661, 679 (4th Cir. 1989) (same); Rice v. McKenzie, 581 F.2d 1114, 1116 (4th Cir. 1978) (same). Additionally, even if this Court had an exparte communication with Plaintiff, the subject of the correspondence--a reprimand for not having the final pretrial order completed when ordered--cannot be characterized as a disqualifying exparte communication. In fact, a reasonable person would consider this subject matter appropriate. See, e.g., Plaintiff's Aff. para.4.

Second, no actual ex parte communication took place between this Court and Plaintiff. Plaintiff s entire factual affidavit deals with a "threat" to make an ex parte communication. The mere mention that an exparte communication is sought by the Court is not proof of personal bias. Additionally, even if the "threat" was made and had been carried out, it was made and would have been carried out by the Court's law clerk. The actions of a law clerk cannot be imputed upon the judicial officer they are employed by. Therefore, taking the Plaintiff's affidavit as true, the threat to seek an *ex parte* communication is not one made by or credited to the Court.

Finally, Plaintiffs affidavit, even taken as true, is filled with nothing more than conclusory statements and opinions. Plaintiff alleges that the law clerk had a special. private, and personal message to relay to Plaintiff on behalf of the Court. See Plaintiffs Aff. para.4. Plaintiff then concludes, without any further allegations, that the mere solicitation of an *exparte* communication is "the most conclusive evidence of bias imaginable." See Plaintiffs Brief at 3; see also Plaintiffs Aff. para.4. Plaintiff fails, however, to allege any facts that lend support to his opinion and conclusion.

These conclusory statements and opinions need not be taken into account when deciding whether this Court should recuse itself under § 144. Vespe, 868 F.2d at 1340; Haldeman, 559 F.2d at 134. In fact, Plaintiff's affidavit and brief submitted in support of his motion are nothing more than a conclusory, unsupported, and tenuous allegation of bias. A judge should not recuse himself based upon such assertions. See Giles v.Garwood, 853 F.2d 876, 878 (11th Cir. 1988), cert. denied, 489 U.S. 1030, 109 S. Ct.1164, 103 L.Ed.2d 222, reh'g denied, 490 U.S. 1032, 109 S. Ct. 1773, 104 L.Ed.2d 208 (1989); United States v. Greenough, 782 F.2d 1556, 1558-59 (11th Cir. 1986), reh'g denied, 788 F.2d 1570 (11th Cir. 1986). Accordingly, the recusal request under § 144 will be denied for lack of merit.[3]

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[3] Because this Court finds no reason to recuse itself under § 144, it likewise finds no reason for a new district judge to be assigned to the matter. Accordingly, Plaintiff's request for a new district judge to be assigned to the case will be denied.

B. 28 U.S.C. § 455

Section 455 deals with the recusal of justices, district judges, and magistrate judges from proceedings in which his or her impartiality may be questioned. Section 455(a) provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify, himself in any proceeding in which his impartiality might reasonably be questioned.'" 28 U.S.C. § 455(a).[4] Pursuant to this statute, a judge must recuse himself in any proceeding "'where a reasonable man knowing all the circumstances would harbor doubts concerning the judge's impartiality.'" Blanch Road Corp. v. Bensalem Township, 57 F.3d 253, 266 (3d Cir.) (quoting United States v. Dalfanso, 707 F.2d 757, 760 (3d Cir. 1983)), cert. denied, 116 S. Ct. 303, 133 L.Ed.2d 208 (1995). Thus, courts must determine not whether any actual bias or prejudice has been shown, but whether the appearance of bias has been demonstrated. Liteky United States, 510 U.S. 540, 550, 114 S. Ct. 1147, 1154, 124 L.Ed.2d 636 (1994) ("[W]hat matters is not the reality of bias or prejudice. but its appearance."); see also United States v. Anta, 53 F.3d 568, 574 (3d Cir. 1995) ("By the statutory language itself ... section 455(a) mandates an objective rather than a subjective inquiry.").

In most cases where recusal is sought based upon a judge's alleged bias or prejudice against a party, however, the bias must stem from an extrajudicial source. See United States v. Bertoli, 40 F.3d 1384, 1412 (3d Cir. 1995) (citing Liteky, 510 U.S. at 555, 114 S. Ct. at 1157); see also Johnson v. Trueblood , 629 F.2d 287, 291 (3d Cir. 1980) (defining extrajudicial bias as bias "not derived from the evidence or conduct of parties that the judge observes" during the proceedings), cert. denied, 450 U.S. 999, 101 S. Ct. 1704, 68 L.Ed.2d 200 (1981). For this reason, judicial rulings or decisions, which derive from and are based upon the actual judicial proceeding before the judge, will rarely form a valid basis for a bias or partiality motion. Bertoli, 40 F.3d at 1412 (citing Liteky, 5120 U.S. at 555, 114 S. Ct. at 1157).

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[4] Under § 455, a justice or judge must also recuse himself "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(b)(1). As stated infra in Section III. A., it is not likely that a reasonable person would conclude that this Court harbors a special bias toward Plaintiff or in favor of Defendants. See also Rosenberg, 806 F.2d at 1173. Additionally, this Court has no personal knowledge of disputed evidentiary facts which concern this case. Accordingly, Plaintiffs motion will only be considered under the "impartiality" provision of § 455.

With these principles as a backdrop, I find the Plaintiff's arguments are without merit. A reasonable person, knowing all of the facts of this case, would not doubt my ability to remain impartial in this proceeding. The mere reference to a possible *ex parte* communication by the Court's law clerk is not something that would normally affect the impartiality of a judge. Furthermore, *exparte* communications are not unconstitutional *per se.* See United States v. Adams, 785 F.2d 917, 920 (1 Ith Cir.), cert. denied sub nom. Jennings v. United States, 479 U.S. 858, 107 S. Ct. 202, 93 L.Ed.2d 133 (1986); LaChappelle v. Moran, 699 F.2d 560, 566 (1st Cir. 1983); In re Singh, 12 F.R.D. 140, 150 (D. N.J. 1988). So even had the communication taken place, its *exparte* nature would not be enough to show a lack of impartiality on the Court's part. Additionally. the touchstone of *ex parte* communications is prejudice to the parties. See United States v. Napue, 834 F.2d 1311, 1323 (7th Cir. 1987); Adams, 785 F.2d at 921; United States v. Earley, 746 F.2d 412, 417 (8th Cir. 1984), cert. denied, 472 U.S. 1010, 105 S. Ct. 2707, 86 L.Ed. 2d 723 (1985); LaChappelle, 699 F.2d at 556-57; In re Singh, 123 F.R.D. at 150. No party could have been prejudiced by the mere "threat" of an *exparte* communication.

Therefore, after reviewing the foregoing cases and the arguments and cases in Plaintiffs brief, I am unpersuaded by Plaintiffs arguments in support of my recusal. A reasonable person would not doubt my ability to remain impartial in the instant civil case based on the alleged comments of my law clerk. First, Plaintiffs affidavit is filled with nothing more than conclusory statements and opinions. Plaintiff concludes, without any factual support, that the mere solicitation of an *ex parte* communication is conclusive of this Court's partiality against him. A reasonable person looking at these conclusory statements and opinions would not question the impartiality of this Court.

Second, as the Court previously noted, my law clerk's communications with the parties dealt solely with the adjournment of the pretrial conference in this case. The purported *ex parte* communication was merely to be a reprimand for failing to meet this Court's deadlines. As Plaintiff admitted in his supporting papers for this motion, "[t]hreatening both counsel with sanctions for missing a court deadline may have been appropriate." Because the reprimand took place during the conference call, no later callwas placed to Plaintiff. Therefore, because the subject of the purported *ex parte* communication was admittedly proper, and *ex parte* communications are not *per se* violative of a litigants rights, had the communication taken place, it would not have reasonably affected the appearance of my impartiality in this case. Accordingly, Plaintiff's motion for recusal under § 455 will be denied.

C. Attorney Fees

Defendants, in their response papers to both the § 144 and § 455 motions, request that if the Court denies Plaintiffs applications, they be awarded attorneys fees under 28 U.S.C. § 1927. Section 1927 states that

> [a]ny attorney or other person admitted to conduct cases in any court of the United States or any

> Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attomeys' fees reasonably incurred because of such conduct." [sic]

28 U.S.C. § 1927. Awards of attorneys fees under § 1927 are committed to the court's discretion. See Thomas v. Capital Sec. Serv Inc., 812 F.2d 984, on reh'g, 836 F.2d 866 (5th Cir. 1987); Powell v. National Football League, 139 F.R.D. 381 (D. Minn. 1991).

. While a court may impose sanctions under § 1927 *sua sponte,* the opposing side must have the opportunity to be heard. Forman v. Mount Sinai Med. Ctr, 128 F.R.D. 591 (S.D.N.Y. 1989). While Plaintiff did have an opportunity to be heard on Defendants' request by submitting reply papers to their opposition, this Court is not satisfied that this afforded Plaintiff the necessary notice. Accordingly, this Court will only consider a request for sanctions pursuant to § 1927 if it is made through a motion on notice. See L.Civ.R. 7.1.

IV. CONCLUSION

For the reasons set forth above, Plaintiff s motion for the assignment of a new Magistrate Judge and/or a new District judge due to bias or prejudice, pursuant 28 U. S.C. § 144, will be denied. Additionally, Plaintiff's motion for the disqualification of the Magistrate Judge, pursuant to 28 U.S.C. § 455, will be denied. Finally, Defendant's application for attorney fees pursuant to 28 U.S.C. §1927 will be denied without prejudice. An appropriate order will issue.

DATED: March 3, 1998

/s/

STANLEY R. CHESLER, U.S.M.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WAGNER D. JACKSON, JR., Plaintiff,	Hon. John C. Lifland Civ. No. 97-0555 (JCL)
V.	
THE RIGHT STUFF, DAWNE TOUCHINGS, and PAULA KRONGARD, Defendants.	**ORDER**

CHESLER, MAGISTRATE JUDGE

This matter comes before the Court on the motions of Plaintiff, Wagner D. Jackson, Jr. ("Plaintiff"), for the assignment of a new Magistrate Judge and or District Judge due to bias or prejudice, pursuant to 28 U.S.C. § 144, and for the disqualification of the Magistrate Judge, pursuant to 28 U.S.C. § 455, and the application of Defendants for attorney fees pursuant to 28 U.S.C. § 1927. The parties' motions were referred to the undersigned by the Honorable John C. Lifland, U.S.D.J. No oral argument was heard pursuant to Fed.R.Civ.P. 78; and consistent with this Court's opinion of even date;

IT IS, therefore, on this 3rd day of March, 1998, hereby

ORDERED that Plaintiff's motion for the assignment of a new Magistrate Judge and District Judge due to bias or prejudice pursuant to 28 U.S.C. § 144 be and hereby is **DENIED**; and it is further

ORDERED that Plaintiffs motion for the disqualification of the Magistrate Judge pursuant to 28 U.S.C. § 455 be and hereby is **DENIED**; and it is further

ORDERED that Defendants' application for the award of attorneys fees pursuant to 28 U.S.C. § 1927 be and hereby is **DENIED** without prejudice.

STANLEY R. CHESLER, U.S.M.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WAGNER D. JACKSON, JR.,
PLAINTIFF,
V.

THE RIGHT STUFF, DAWNE TOUCHINGS AND PAULA KRONGARD,
DEFENDANTS.

CIVIL ACTION NO: 97-555(JCL)

MEMORANDUM AND ORDER

LIFLAND, District Judge

Presently before the Court is Defendants' motion for costs and attorney's fees. For the reasons set forth below, Defendants' motion will be granted.

BACKGROUND

Plaintiff, a United States Department of Justice trial attorney, practicing law for over thirteen years, filed this action pro se on February 3, 1997, claiming that his membership in The Right Stuff, Inc., a dating, service, was terminated on the basis of his race and/or gender. Plaintiff claimed that Defendant The Right Stuff, Inc. and its owners Dawne Touchings and Paula Krongard[1] ("Defendants") discriminated against him based upon his gender and/or his race (African-American/Native-American), in violation of 42 U.S.C. § 1981 ("§ 1981 "); Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, et. seq. ("Title II"); and the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1, et. seq., by terminating his membership in the dating service in or about May 1995.

Defendants asserted that Plaintiff's membership in The Right Stuff was terminated as a result of his improper conduct towards other members and was in no way based on Plaintiff's gender or race. The alleged improper conduct included baselessly accusing one woman of being a racist and a liar after she declined to date him a second time and using improper methods to learn the identity and work telephone number of another woman who failed to return Plaintiff's calls to her home.

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[1] As of March 1997, Defendant Touchings became the sole owner and operator of The Right Stuff. (Touchings Dep. 4:23-5:11)

On February 11, 1998, Defendants moved for summary judgment on Plaintiff s claims. On May 7, 1998, the Court granted Defendants' motion and Plaintiff's complaint was dismissed in its entirety. The Court also denied Plaintiff's appeal of Magistrate Judge Chesler's March 4, 1998 Order denying Plaintiff's motions for the assignment of a new Magistrate Judge and/or District Judge due to bias or prejudice.

DISCUSSION

Initially, in his opposition to Defendants' motion for attorney's fees and costs, Plaintiff asserts that this Court has no jurisdiction to entertain the present motion, since Plaintiff's appeal of the Court's Order granting Defendants' motion for summary judgment is presently before the Third Circuit. Defendants have requested attorney's fees and costs numerous times in conjunction with several motions in this case. The Court had the discretion to award such fees and costs when it granted Defendants' motion for summary judgment. However, since Plaintiff failed to respond to Defendants' requests for attorney's fees, the Court required Defendants to bring their request as a formal motion, in order to ensure that Plaintiff had an adequate opportunity to respond. Generally, attorney's fees are considered collateral matters. In Bundich v. Becton Disckinson & Co., 486 U.S. 196 (1988), the Supreme Court held that a decision on the merits is final and appealable even if the recoverability or amount of attorney's fees is questionable. Consequently, the Court clearly had, and continues to have, jurisdiction to decide the present motion.

Plaintiff correctly points out that the general rule in the United States is that absent legislation to the contrary, litigants must bear their own attorney's fees. See Alyeska Pipeline Service Co- v. Wilderness Society, 421 U.S. 240 (1975). However, each of the three statutes which form the basis of Plaintiff's claims, § 1981, Title II and the NJLAD, grants the Court discretion to award attorney's fees to a prevailing party in an action.

The statutory authority for awarding attorney's fees in § 1981 cases is set forth in § 1988(b). That section provides, "[iln any action or proceeding to enforce a provision of sections 1981 ... of this title ... the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b).

The attorney's fees provision of Title II states in relevant part that "[i]n any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs . . ." 42 U.S.C. §2000a-3.

Defendants were clearly the "prevailing party" on all claims in this action. However, prevailing plaintiffs and prevailing defendants are not treated identically when they apply for attorneys' fees under § 1988 and Title II. Although the statutes do not distinguish between plaintiffs and defendants, the Supreme Court has set up differing standards. The standard to be used in determining whether a request for attorney's fees by a prevailing defendant in a civil rights action should be approved is set forth in Christianburg Garment Co., v. EEOC, 434 U.S. 412 (1978). In that case, the Supreme Court held that "a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Id. at 421. The standards for awarding attorney's fees under Title VII and Title II of the Civil Rights Act of 1964 are the same. See Newman v. Piggie Park enterprises,[sic] Inc. 390 U.S. 400 (1968). Although Christianburg dealt with fee awards under the Civil Rights Act of 1964, the Supreme Court has subsequently indicated that "[t]he legislative history of § 1988 indicates that Congress intended that 'the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act.'" Hensely v. Eckerhart, 461 U.S. 424, 433 n. 7 (1983). See also Hanrahan v. Hampton, 466 U.S. 754, 758 n. 4 (1980) ("The provision for counsel fees in § 1988 was patterned upon the attorney's fees provisions contained in Title II and VII of the Civil Rights Act of 1964 . . ."). Thus, the analysis adopted by

Christianburg in determining whether to award attorney's fees to a prevailing party is the appropriate analysis to use in connection with both Plaintiff's § 1981 and Title II claims.

A successful plaintiff in a civil rights action should ordinarily recover attorney's fees, in order to effectuate the congressional policy of encouraging plaintiffs to act as private attorneys general and to enforce the Civil Rights Act. Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975); Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968). However, routinely awarding attorney's fees to prevailing defendants would have an overly deterrent effect on civil rights plaintiffs and would discourage the vigorous private enforcement of the civil rights laws. Christianberg, 434 U.S. at 422. But a defendant must be able to recover attorney's fees when the action is groundless because, "while Congress wanted to clear the way for suits to be brought under the [Civil Rights] Act, it also wanted to protect defendants from burdensome litigation having no legal or factual basis." Id. at 420 Smith v. Continental Ins. Corp., 747 F. Supp. 275, 285 (D.N.J.), aff'd, 941 F.2d 1203 (3d Cir. 1990) (award of attorney's fees to prevailing defendant from former employee claiming race and sex discrimination under § 1981 and Title VII was appropriate where plaintiffs claims were clearly frivolous).

In this case, therefore, the Court must first determine whether Plaintiff s action was unreasonable, frivolous, meritless, or vexatious. Christianhurg, 434 U.S. at 420-21. A district court must resist the temptation to conclude that, because the plaintiff did not ultimately prevail, his action must have been meritless. Id. at 421-22. On the other hand, plaintiff's honest belief in the worth of his case does not make it meritorious. As the Supreme Court explained:

> [T]he term "meritless" is to be understood as meaning groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case, and ... the term "vexatious" in no way implies that the plaintiff s subjective bad faith is a necessary prerequisite to a fee award against him ...
>
> [N]eedless to say, if a plaintiff is found to have

> brought or continued [a meritless] claim in bad faith, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense.

Id. Assessment of the action's frivolousness and the award of attorney's fees are clearly within the discretion of the district court. Id. at 416.

Plaintiff s claims under the NJLAD for gender and race discrimination were based on the same allegations as his claims under § 1981 and Title II. However, the NJLAD provides that attorney's fees may not be awarded to a defendant "unless there is a determination that the charge was brought in bad faith." N.J.S.A. 10:5-27.1.

The case law defining "bad faith" in an action brought under the NJLAD is sparse. In Brown v. Fairleigh Dickinson University, 560 F. Supp. 391, 406 (D.N.J. 1983), the Court awarded attorney's fees to the defendants on the plaintiff s federal civil rights claims, after determining that these claims were groundless. However, the Court refused to award attorney's fees on the plaintiff s NJLAD claims, after determining that the plaintiff had not acted in bad faith. Id. The Brown court gave no explanation for its conclusion that the plaintiff s NJLAD claims were not brought in bad faith. Id. For the reasons set forth below, the Court concludes that Plaintiff's claims under the NJLAD, as well as his claims under § 1981 and Title II, were not only groundless, but were also brought in subjective bad faith, thus entitling Defendants to attorney's fees and costs under each of these statutes.

Plaintiffs actions throughout the course of this litigation create a strong inference that his claims were brought to harass Defendants for their termination of his membership in their dating service. Indeed, during the course of this litigation, Plaintiff took a number of actions which clearly evidenced bad faith on his part. For instance, Plaintiff filed two substantially identical and utterly groundless motions to replace the Magistrate Judge and District Court Judge due to bias or prejudice. Plaintiff s motions to replace the Magistrate Judge and District Court Judge were based on his assertion that the law clerk of the Magistrate Judge stated that the Magistrate Judge wanted to have an ex parte communication with Plaintiff. Magistrate Judge Chesler found Plaintiff s claim to be completely groundless and meritless. Although Plaintiff's motions also sought to replace the District Judge, there were no allegations made at all against the District Judge. Plaintiff simply stated that "given the close working relationship between [district] judges and their magistrates, reassignment to a new [district] judge is to be preferred." Plaintiff also appealed Magistrate Judge Chesler's Order denying both of these frivolous motions.

Also, despite the fact that the plain language of both Title II and § 1981 make clear that such statutes do not prohibit discrimination based upon gender, and the fact that Defendants notified Plaintiff of such fact as early as the Joint Discovery Plan, and as late as the Joint Pre-Trial Order, Plaintiff failed to withdraw such claims. While the NJLAD does prohibit gender discrimination, the Court determined that Plaintiff's gender discrimination claims were meritless. Plaintiff now claims for the first time that he "never made" a gender discrimination claim and that he "explicitly disavowed" this claim in his opposition brief to Defendants' motion for summary judgment. (Pl. Br. in Opp. to Attorney's Fees at 5, n. 3.) In opposition to Defendants' motion for summary judgment Plaintiff stated only that "reference to gender discrimination [in his complaint] simply covers the possibility that The Right Stuff discriminates against non-Caucasian men but not non-Caucasian women." (Pl. Br. in Opp. to Summary Judgment at 10, n. 11.) This statement is not a disavowal of the claim as Plaintiff now contends, but instead seemingly tries to explain what is clearly a frivolous claim. Plaintiff's complaint clearly stated a claim for gender discrimination. Each allegation in the complaint states that Plaintiff was discriminated against on the basis of "race and/or gender." (See Compl.) Defendants have had to defend against Plaintiff's gender discrimination claims throughout the course of this litigation. Further, Plaintiff s testimony at his deposition makes it clear that he knew that his claims of gender discrimination were meritless and frivolous. Plaintiff testified that he "doesn't have any independent evidence dealing with the subject of gender. . ." and that he only included this allegation since he didn't "know exactly how [Defendants] discriminated. . ." (Pl. Dep. 129:17130:9.) The fact that Plaintiff knew that his gender discrimination claims were meritless from the beginning further proves that Plaintiff s complaint was brought in subjective bad faith.

Plaintiffs allegation and arguments concerning his race discrimination claims were also rife with baseless conclusions. Plaintiff s membership in The Right Stuff was terminated, in part, because he sent harassing e-mails to a former The Right Stuff member, Liz Miller, accusing her of being a racist after she refused to go on a second date with him. The Court noted in its Opinion granting summary judgment for Defendants that Plaintiff admitted that he had no reason to believe Ms. Miller was a racist except for the fact that she refused to go on a second date with him and because of Plaintiffs "general knowledge of American society." (5/7/98 Opinion at 6; Pl. Dep 68: 1-10.)[2] The Court also noted that:

> When asked at his deposition to state the basis of his race discrimination claim, Plaintiff merely expressed his assumption, without any evidence, that once Defendants heard from Miller that he had "called her a bigot that was the end."
> (Pl. Dep. 101: 1-6.) At most, this may constitute evidence that Defendants were aware of Plaintiff's, race when they terminated his membership, not that they intentionally discriminated against him because of it. Plaintiff's allegations, which are based on his mere assumption, do not constitute evidence of discrimination, and are insufficient to rescue his

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[2] In opposition to the present motion Plaintiff further asserts that he has a trial exhibit showing that "77% of white Americans admit refusal to even consider a romantic relationship with a black person" and that this shows that Miller refused to date him because he is not white. (Opp. Br. at 6.) Plaintiff has failed to realize that regardless of Miller's reasons for refusing to go on a second date with him, Plaintiff s membership was terminated because of his improper conduct towards her and towards another The Right Stuff member, who had not even met Plaintiff, and undisputedly, did not know Plaintiffs race.

claims from summary judgment.

(5/7/98 Opinion at 14.) Plaintiff s own deposition testimony shows that his claims of race discrimination were groundless and meritless and were simply the product of his own baseless conclusions. Plaintiff s testimony also supports the Court 's determination that these claims were brought in subjective bad faith, since this testimony shows that Plaintiff knew his race discrimination claims were baseless from their inception.

In granting Defendants' motion for summary judgment, the Court found that both Plaintiff's race and gender discrimination claims were wholly without merit and had absolutely no bases in law or in fact. Plaintiff never proffered any evidence that Defendants terminated him for any reasons other than legitimate non-discriminatory reasons. After hearing the complaints of two members about Plaintiff's overly intrusive and obnoxious behavior, and after determining that Plaintiff's rationalizations for his inappropriate conduct were inadequate, Defendants terminated Plaintiff's at-will relationship with The Right Stuff to prevent Plaintiff from harassing any more of its members. (Pl. Dep. 33:11-19; Touchings Cert. at para. 5.) Plaintiff could present no evidence of illegal discrimination other than his own baseless conclusions, and could not articulate any damages that he had suffered as a result of the discrimination he alleged.

Further, despite the fact that Defendants notified Plaintiff of their intent to seek costs and fees from him by letters dated November 20 and November 24, 1997, on the grounds that his claims were frivolous, Plaintiff failed to withdraw his complaint. Plaintiff, as an experienced trial attorney, should have known that his claims were frivolous. At the very least, Plaintiff "should have known from pre-trial discovery that his claims were unreasonable, without foundation, and based purely upon speculation." Flowers v. Jefferson Hospital Ass'n, 49 F.3d 391 (8th Cir. 1995) (district court did not abuse discretion in granting fees to prevailing defendant in § 1981 claim). The fact that Plaintiff did not withdraw his claims,.in spite of being given clear notice of their frivolous nature, further supports the Court's conclusion that Plaintiffs claims were brought in subjective bad faith.

Plaintiff's arguments in opposition to the present motion also stem from the same kind of baseless and meritless conclusions he has reached throughout the course of this litigation. Plaintiff claims that the Court erred in finding that his claims lacked merit. In support of this assertion Plaintiff states:

> Indeed, it is telling that the defendants, defense counsel, the Federal magistrates and the Federal judge involved in this case are all white. Plaintiff is of color and at least some of the members of a Newark, N.J. jury would be as well. Clearly, a jury would be the more fair and accurate finder of fact in this case, which is probably why defendants, defense counsel, the Federal magistrates and the Federal judge involved in this case all desperately seek to prevent this case from ever reaching a Newark, N.J. jury.

(Pl. Opp. Br. at 7.) Contrary to Plaintiff's assertion that there was some sort of conspiracy to keep his claims from going to trial, the Court determined that Defendants' were entitled to summary judgment because Plaintiff had failed to set forth any direct or circumstantial evidence that created even an inference of illegal discrimination.

In deciding the present motion, Plaintiff will not be given any special consideration given his pro se status, since Plaintiff is not the typical pro se at litigant. Plaintiff is a U.S. Department of Justice trial attorney who has been practicing law for over 13 years. He attended Harvard College and Yale Law School. Plaintiff is far from an uneducated lay person who may not understand the law and the consequences of pressing frivolous claims. Even if the Court were to give special consideration to Plaintiff because of his pro se status, the Court's conclusions would still be the same. This is because "while the court is, as it must be, solicitous of pro se litigants, pro se status will not insulate an individual when [he], dragging opposing counsel along the way, determines to make court his personal playground." Smith v. Continental Ins. Corp., 747 F. Supp. 275, 285 (D.N.J.), aff'd, 941 F.2d 1203 (3d Cir. 1990) (awarding attorney' [sic] fees to defendant from former employee claiming race and sex discrimination under Title VII and § 1981). Accordingly, having determined that Plaintiff's claims were groundless and brought in subjective bad faith, and that Plaintiff has also brought numerous meritless motions in the course of this action, including, but not limited to, Plaintiff s two motions to remove the judges assigned to this case due to prejudice or bias, Plaintiff s motion for sanctions against defense counsel, and the appeal in each case of the Magistrate Judge's orders, Defendants are entitled to reasonable attorney's fees and costs in this action.

As described above, an objective analysis of the evidence in the record reveals that Plaintiff's claims were groundless and frivolous, clearly entitling Defendants to attorney's fees in connection with Plaintiff's Title II and § 1981 claims. Although the Court has also determined that the evidence in the record shows that Plaintiffs claims were brought in subjective bad faith, entitling Defendants to attorney's fees in connection with Plaintiff's NJLAD claims, the Court is aware that this determination required the Court to engage in a more subjective analysis of Plaintiff s motives. Because of the difference in standards for awarding attorney's fees under the NJLAD as compared with Title II and § 1981, the Court has analyzed the billing records submitted by defense counsel, in order to determine what portion of the fees billed was for work done in connection with Plaintiffs NJLAD claims. Defendants' billing records show separate entries specifically for work performed concerning Plaintiff s NJLAD claims, totaling only approximately five hours of work. Further, Plaintiff's claims under the NJLAD, Title 11 and § 1981 were the same. Under each statute, Plaintiff brought a gender discrimination claim and a race discrimination claim. Claims of gender and race discrimination under the NJLAD are determined in accordance with the standards for such claims under federal discrimination statutes. Therefore, both the factual and legal analysis necessary to determine Plaintiffs race discrimination claims were the same under the NJLAD, Title 11 and § 1981. Plaintiff s gender discrimination claims under the NJLAD, Title II and § 1981 were based on the same set of facts. Although gender discrimination claims are only recognized under the NJLAD, the Court's review of the billing records from Defendants' counsel reveals that any separate time spent defending Plaintiff s NJLAD gender discrimination claim was de minimis. Therefore, it appears that the work performed by defense counsel on this case, and hence, the attorney's fees in this case, would have been almost exactly the same even if Plaintiff had never brought an NJLAD claim.

Grotta, Glassman & Hoffman, P.A., has been counsel for Defendants since in or about November of 1996, when the case was pending in the New Jersey Division of Civil Rights, although Defendants only seek fees for the work done on this case after it was filed in this Court in February of 1997. The Affidavit of Michael Barabander describes the hourly rate of the attorneys who have worked on this matter at Grotta, Glassman & Hoffman. According to the Affidavit, the fees charged by these attorneys are commensurate with the fees of similar firms in New Jersey. The hourly billing records of the firm on this matter for the period March 1997 to March 1998 are attached to the Affidavit. (Billing Records, attached as Ex. I to Aff. of Michael Barabander.) The total fees charged for this period were $81,878.75. Id. In addition, costs for this period were $7119.49. Id. According to the Affidavit of Michael Barabander, Defendants will also be billed approximately $2,850.00 plus associated expenses for the preparation of this application. (Aff. of Michael Barabander at 3.) The Court has reviewed the Affidavit of Michael Barabander and the accompanying billing records, and has determined that the fees and costs requested are reasonable. Since the amount requested is reasonable, Defendants will be granted the requested costs and attorney's fees in the amount of $91,848.24.

Accordingly, **IT IS** on this 22nd day of July, 1998 **ORDERED** that Defendants' motion for attorney's fees and costs in the amount of $91,848.24 is granted.

/s/
John C. Lifland
United States District Judge

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23 December 1997

Honorable Stanley R. Chesler
United States Magistrate Judge
United States District Court
District of New Jersey
U.S. Post Office and Courthouse Bldg.
Federal Square - Room 457
P.O. Box 999
Newark, New Jersey 07101-0999

Re: Wagner Jackson v. The Right Stuff et. al. Civil Action No. 97-555 (JCL)

Dear Judge Chesler:

As you know, this Firm represents the defendants in the above referenced matter. In accordance with Your Honor's direction during our conference call today, enclosed please find an order granting defendants' request to extend the filing/service dates of various motions, from December 31, 1997 to January 14, 1998. If the order meets with your approval, please execute and forward it to the Clerk for filing.

Thank you for your consideration of this matter.

Very truly yours,
GROTTA, GLASSMAN & HOFFMAN, P.A.

/s/
FRANCINE ESPOSITO
C: Wagner Jackson, Esq.(w/enclosure)

Colloquy 3

MR. JACKSON: All right. There are three Orders that are in question in this motion. The first is the Discovery Order. That is to say the May 1 comprehensive Discovery Order. It limits defendant's discovery to interrogatories to the plaintiff and a deposition of the plaintiff. Period. That's all it says. That Order was violated when opposing counsel contacted my supervisor in the Justice Department and threatened to send him a subpoena to take his deposition. She has also made contact with a former employer of mine. That too is outside of the Discovery Order.

In addition to the violation, there is also opposing counsel's answering brief in which she says not that "I violated the Order because I just forgot about it" or "I violated the Order because in the heat of the moment I lost track of my restrictions". Her answering brief says, "It is axiomatic that discovery leads to more discovery and that consequently this Order was not binding upon subsequent discovery". Subsequent can only mean in this instance subsequent to the point in time at which she decided this order was no longer binding upon her.

The second matter is the June 19th Order that counsel produce certain bios, that is to say one-page descriptions of various members of the membership of The Right Stuff. That teleconference took place on June 19th. Opposing counsel submitted an Order on June 20th in response to your decision that the bio's had to be produced but that the names and addresses of the people involved were to be redacted so that I could not contact them. I was permitted simply to make use of the paper itself.

Colloquy 4

That Order also indicated that the bio's were to be produced before Ms. Hutchings' deposition. That was mentioned in three letters that I sent to opposing counsel, and it's also mentioned in the motion itself. During the course of the teleconference, Ms. Esposito said ""I'm not sure I can produce them on time". Your response was "Then postpone the deposition". She then promised both me and you that the material would be produced before the deposition so that I could make use of it.

Now, her Order which memorializes this teleconference was submitted the following day, the 20th. And on the 24th, I found out that the production was not complete, thereby suggesting that the deadline was intentionally omitted from the Order which she sent in for your signature, because she knew that four days later she would be violating it. When you finally did sign the Order on July 7th, it had already been violated.

The final matter is the Court's Order staying ail discovery. After that Order was in place, I got a call from a former employer, a Ms. Susan Hershell (phonetic) indicating that she had been given a subpoena and was required to produce documents from my file and she wanted to know what she should do. I then sent her a letter saying that discovery in this matter has been stayed, you shouldn't do anything. And in fact, opposing counsel should have told you that.

Colloquy 5

So again, we're talking about not just a single violation, but violations of three separate Orders, multiple violations, and violations followed up by an answering brief which says, "No, I have the right to engage in these violations. Circumstances changed, and I decided those limitations no longer bind me."

THE COURT: All right. Counsel.

MS. ESPOSITO: Your Honor, obviously I disagree with the plaintiff's rendition of my behavior in this case. The May 1st Order that you made said that, you laid out what discovery would be in this case, and you said at the end "these depositions" -- and in parentheses -- "and all fact discovery shall be completed not later than June 30th, 1997". It's the practice of my firm, and I've talked to many lawyers, that initial Discovery Orders are not necessarily Orders of limitations. They're to set the schedule. I was subpoenaing documents. I didn't need, didn't think I needed to go ask you and say, "'Judge, is it okay if I subpoena some documents". In my brief, I've outlined a number of circumstances which I believe that plaintiff was less than truthful in his discovery responses and in his deposition, and I felt the need that in order to defend defendant's case, I had to find out additional information, and to subpoena additional witnesses, and to subpoena documents was my way of defending the case. I didn't think at the time that I was doing that I was violating your first Order.

colloquy 6

With regard to the second Order, the motion to -- the Order to give, to produce redacted copies of the biographies, we did in fact comply with the Order. And for him to suggest I intentionally left something out, intending to violate the Order is just ridiculous. I don't do that. But we did in fact give him six biographies the morning of Ms. Hutchings' deposition which we feel was in compliance with the Order. At his request we looked for additional documents and we did provide those to him in a timely basis. So for him to suggest that we didn't comply and intentionally didn't comply is just, has no basis in the truth.

With regard to the third order, your discovery stay, I subpoenaed the records from his former law firm well before the stay on any more discovery. Frankly, I didn't think I had to go around saying "stop". I didn't do anything additional after that date, nor did I seek from the law firm to obtain those documents. When she called me and said "what should I do, I want to talk to the plaintiff", I gave her plaintiff's phone number. I didn't say ""you must give me these documents". I didn't say "I'm going to do a motion to compel these documents". I said "here's the plaintiff's phone number, you

Colloquy 7

can call him". Conceivably he would have said, "Oh, okay, send them" because in his papers to you previously he said that that subpoena as pointless and irrelevant but not malicious. So I didn't think that he had a real problem with it, and he could have ultimately quashed the subpoena if he felt that it was that invasive or improper. And as I said, I did not intentionally violate your Order staying discovery.

And in fact, I did put in all of my papers to you additional motions to compel discovery on all of the outstanding matters that plaintiff has yet to respond to.

THE COURT: Such as?

MS. ESPOSITO: At his deposition, he was asked to provide a number of things, and he agreed to provide them. And weeks afterwards I sent him a letter since he still did not give those documents. They included proof of his race. He's indicated that he's a number of races mixed together and we wanted to know documents evidencing his race. He had documents that -

THE COURT: What did you expect him to give you?

MS. ESPOSITO: He said that he had a birth certificate that indicated color or some mixture of races, and I'd like to see that.

The other things that we asked for were checks made out to The Right Stuff evidencing whether or not he paid fees to The Right Stuff. That's been a bone of contention in this case. As well as an alleged return receipt or letter that he sent to The Right Stuff regarding complaints to them that we have no record of.

The other things that we'd like, during -- in his initial interrogatories we asked him about any other agency actions regarding discrimination that he may have filed. And he did not completely answer that question with regard to some EEOC charges he had filed. And even at the deposition he was less than forthcoming about these charges. And when he ultimately did admit to their existence, I asked him for any documents in his possession that he could provide me, and he refused to do so.

In addition, I asked him a number of things like individual employees that he's worked with at the Department of Justice. We maintain that he is engaged in a great deal of inappropriate conduct with regard to his membership in The Right Stuff. And the only other place where we can seek as to whether he has a pattern of doing this is at his job where he has interaction with a number of different people.

THE COURT: Do you expect me to allow you to go and take depositions of every person that he worked with?

MS. ESPOSITO: No, we're not asking that, Your Honor. We're asking his supervisor and we're asking for documents in his personnel file or any other documents in confidential files which may indicate that he's had complaints filed against him or he's filed complaints regarding discrimination which would show that he has a pattern and practice of filing such charges, and in fact meritless charges at that.

THE COURT: All right. Anything else, Mr. Jackson?

MR. JACKSON: Yes. Supposedly counsel indicated that the purpose of a Discovery Order is not to limit discovery. What then is the purpose of a Discovery order if not to limit discovery? Discovery can go on without a Discovery Order by agreement of counsel. Moreover, the Rule 26 Discovery Order is a relatively recent addition to the Federal Rules. Indeed, the sole purpose of a Discovery Order is to limit discovery, based primarily on relevance. These limitations in Ms. Esposito's opinion were inappropriate and she decided essentially to write her own Discovery Order.

Her response to the second Order that she violated was simply ""I don't do that". Well, I have no response to that.

With regard to the stay, what does a stay of discovery mean unless it means no more discovery? That is to say you have to contact the people you've asked for information from and tell them this matter has been stayed, particularly when the stay of discovery is based on the fact that you weren't entitled to ask for these things in the beginning, to begin with. It's outside the comprehensive Discovery Order. In any stay, that would be the appropriate procedure. That is more than obviously what should have been done in the case of this stay.

THE COURT: All right. And what about these items that were requested?

MR. JACKSON: I have no objection to producing any of those items. The reason I haven't produced them is because it appeared to me that discovery in this case was completely out of control. The individual items that she mentioned are not objectionable. I don't mind giving her my birth certificate. I do mind her violating the Discovery Order and contacting my supervisor and saying "I'm going to send you a subpoena and take your deposition". So I wanted these matters resolved before I went forward with discovery. I don't object to the individual items that she mentioned like cancelled checks and birth certificates and things like that. However, my files are irrelevant to the matter, both my EEO files and any other files- And moreover, there is nothing in there indicating that I've harassed anybody.

THE COURT: Well, the argument of the defendant is that you've engaged in a pattern of practice of making baseless discrimination charges against others, as they say that you've done here. It seems to me to make it discoverable, doesn't it?

MR. JACKSON: Well, there's an indication that I have filed one other case. The details of that case are irrelevant to this one. Moreover, the details of that case involve mostly other employees in the Justice Department. And consequently I have been warned by the Justice Department not to release this information because it's protected under the Privacy Act. The only information she can get from the EEO files is the fact that I have filed an action. She already knows that.

THE COURT: Well, was there a resolution of that action or is it still pending?

MR. JACKSON: It's -- well, there's a resolution of the action insofar as the Justice Department has determined that it was invalid. And I now have to appeal it within the EEOC.

THE COURT: All right. There are a number of matters before -

MS. ESPOSITO: May I respond, Your Honor?

THE COURT: Yes.

MS. ESPOSITO: With regard to a number of the points that plaintiff has made today, the first Discovery Order that we're talking about, how I -

THE COURT: Counsel, the only thing I'm interested in hearing from you on now is the discovery of EEO information.

MS. ESPOSITO: Okay, Your Honor. We've addressed the Privacy Act in the papers. And the standard for discovering documents that are allegedly protected by the Privacy Act is that you can get it with a Court Order. And all you need to get a Court Order is relevancy. And I think we've argued -

THE COURT: Well, I understand -

MS. ESPOSITO: -- relevancy here and -

THE COURT: Counsel, excuse me. I understand I can order documents to be produced under the Privacy Act. But the question is that there are non-party rights involved here just as there were non-party rights of other people who might have been -- who met Mr. Jackson through The Right Stuff or whatever.

MS. ESPOSITO: And as in the case where we had names redacted, the Government is free to do that as well. All we want to know is what is the basis of his complaints and is there any merit to them. And obviously the Department of

Justice has already found that there was not.

THE COURT: Well, I understand that, counsel.

MS. ESPOSITO: And also the plaintiff says that there are no documents but he may not be aware of documents in his file. There may be confidential files, people complaining, but he was never made aware of it. There can be an endless number of documents out there about him and his behavior in the work place, and I think it's relevant in this matter. And I can't go just on what he says as to whether or not they exist or not.

THE COURT: Well, I understand that, counsel, but you don't have carte blanch to go through a personnel file to look through it for anything you want.

MS. ESPOSITO: Right, I understand that. And we'd be willing to have it be limited to complaints about complaints by Mr. Jackson, and any other thing relevant to his behavior in the work place. I don't need to know his salary. I don't need to know information like that.

THE COURT: And there's a subpoena pending or served on some firm in Philadelphia?

MS. ESPOSITO: Yes, Your Honor. And they've been able, willing and -- willing and able to provide the documents but for the stay.

THE COURT: All right. There are several applications before me this morning with regard to the civil action. Mr. Jackson made one comment, that the discovery is out of control in this case. Based on the record before me, I don't see discovery out of control, but frankly I see the relationship between the plaintiff who is an attorney, and defense counsel as being out of control. And that strikes me t to be the basic problem for everything that's going on here.

Based on the rulings, or based on the file I have and the papers, I am satisfied that we should proceed as follows:

First, with regard to my May 1 Letter Order, plaintiff asked a rhetorical question of whether a Discovery Order is supposed to control discovery. Of course it is.

Paragraph 3 of that Order provides, quote, "Plaintiff seeks to depose non-party witnesses. Defendant wishes to depose plaintiff. These depositions (and all fact discovery) shall be completed not later than June 30, 1997."

My intent in drafting this Letter Order was not to limit the depositions to the several depositions that were noticed in the Letter Order, but instead to give the parties an opportunity to take discovery through June 30th, and to deal with and make note of depositions that the parties intended to take during a telephone conference call on April 28th. My recollection from the conference is that at first blush there was some question as to whether any discovery was necessary in this case given the EEO proceeding that had been pending previously. This reflected discovery that the parties intended to take on that date and also set a discovery closure date.

Therefore, I am not satisfied that there is any violation by the defendant of my May lst Letter Order.

With regard to defendant's compliance with my Order of July 8, 1997, signed on July 7, 1997, I did order the defendants to produce biographies with certain deletions. I also ordered the plaintiff not to have any contact with members of The Right Stuff or individuals. And I also directed that audiotape recorders could be used at depositions because of the expense of deposition transcripts. Based on the record before me, I am not satisfied that there has been any violation of my Order by the defendants with regard to the production of the biographies. I do note that certain biographical information was obviously produced to plaintiff at the commencement of the deposition. Apparently other matters were not turned over. On this record, I see no prejudice to the plaintiff. I'm not prepared to find a violation.

Third, with regard to the stay of discovery, plaintiff is correct. When the Stay Order was issued by me, that directed that all discovery cease, and it was Ms.

Esposito's obligation to advise parties subpoenaed that there should be no compliance with the subpoena pending a resolution of the disputes before me. However, I find no prejudice to plaintiff by this. I find no harm to plaintiff. And I find no expense that warrants any type of sanction on Ms. Esposito other than the admonition that a stay is a stay, and all proceedings should close when that happens.

MS. ESPOSITO: Yes, Your Honor.

THE COURT: Now, there are several matters left open. First, the production of a birth certificate, any checks to The Right Stuff, and any letters to The Right Stuff as indicated by Ms. Esposito. Mr. Jackson, I presume you could provide that within two weeks of today?

MR. JACKSON: That is correct.

THE COURT: All right. So that's by September 22. Ms. Esposito, with regard to these EEO filings and

C. Counsel's Conduct Did Not Violate Magistrate Hedges' May 1 or June 19 Orders, Federal Rules, Nor Plaintiff's Privacy Rights.

Counsel did not violate any of Your Honor's Orders, the Federal Rules, nor plaintiff's rights. First, counsel did not violate Your Honor's May 9 Order which outlined the parties intended discovery. Indeed, it seems axiomatic that as discovery progresses, additional discovery, including subpoenaing records, becomes necessary. This is especially true, where as here, plaintiff has attempted to forestall more direct discovery

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6 Plaintiff's July 22 letter accuses counsel of "repeated, flagrant and contemptuous violation of court orders." Plaintiff specifically alleges that counsel continued discovery despite Your Honor's July 14 Order staying discovery until September 8. Plaintiff, again, wrongfully accuses counsel as the subpoena to plaintiff's former law firm was mailed well before Your Honor's stay of discovery, and plaintiff never attempted to quash such subpoena. In any event, as a result of plaintiff Is letter, the law firm has withheld subpoenaed documents pending the outcome of plaintiff's motion. (See plaintiff's July 22 letter and the law firm's response which are attached hereto as Exhibit D).

methods and has raised questions regarding his credibility. Accordingly, Your Honor's discovery order cannot be considered a provision of subsequent discovery.

Second, counsel did not violate Your Honor's June 19 Order either. Such Order prohibited plaintiff from discovering private information regarding Right Stuff members and other individuals who dated a third party witness in this case. Indeed, such Order did not apply to defendants or discovery regarding the plaintiff in this litigation.

Third, plaintiff's citation to the Restatement (Second) of Torts is not only ridiculous in this context, but wholly without factual or legal support. Counsel has not "publicized" "private" information that would be "highly offensive to a reasonable person." Restatement (Second) of Torts §652D. Indeed, as the official comments to the Restatement make clear, communication of the already public pleadings of a lawsuit to a single person is not actionable. Restatement (Second) of Torts § 652D cmt. a,b. In any event, investigations which are related to a litigation are non-actionable and are absolutely immuned under the litigation privilege. See Restatement (Second) of Torts § 586587; Hawkins v. Harris, 141 N.J. 207 (1995) (litigation privilege extended to defamatory statements by investigator in course of pre-trial discovery); (Peterson v. Ballard, 292 N.J.Super 575 (App. Div. 1996) (litigation privilege applied to NJLAD and intentional infliction of emotional distress claim); Middlesex Concrete Products & Excavating Corp. v. Carteret Industries Ass'n., 68 N.J.Super. 85, 92 (App. Div. 1961) (litigation privilege extended to tortious interference claim).

Based on the foregoing, counsel's actions were merely to conduct legitimate discovery and were in no way improper or sanctionable.

WAGNER D. JACKSON, JR.
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Silver Spring, MD 20902
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202-616-4222 (work)
WDJ-3423

UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY

Wagner D. Jackson, Jr.
Plaintiff, Civil Action No. 97-555(JCL)

The Right Stuff, Dawne Touchings
and Paula Krongard
Defendants

MOTION FOR SANCTIONS AND SUPPORTING CERTIFICATION

Wagner D. Jackson, Jr., plaintiff pro se in this action, hereby moves this Court to impose severe sanctions upon Francine Esposito and/or Grotta, Glassman & Hoffman for outrageous conduct in violation of both this Court's 1 May 1997 order governing discovery and Restatement (Second) of Torts §625 ("invasion of privacy").

CERTIFICATION IN SUPPORT OF MOTION FOR SANCTIONS

WAGNER JACKSON, of full age, having been duly sworn upon his
oath, deposes and says:

I. On Monday, 23 June 1997, defense counsel Francine Esposito took plaintiff's deposition and harassed and taunted plaintiff with questions completely irrelevant to this litigation which served only to threaten plaintiff with damage to his career in the U.S. Department of Justice.

2. During earlier discovery, plaintiff refused to give defense counsel information about his immediate supervisor, because any contact with plaintiff's supervisor in connection With a public accommodations discrimination case could only be discovery abuse in violation of this Court's I May 1997 discovery order and invasion of privacy in violation of Restatement (Second) of Torts §625. Plaintiff informed defense counsel that the information she sought regarding plaintiff's employment record was irrelevant and undiscoverable. Moreover, plaintiff informed defense counsel that this information was located in the
personnel office of the Justice Department; so even if the information were relevant, this would not justify contact with plaintiff"s supervisor.

3. In full knowledge of the above, during the deposition of plaintiff on 24 June 1997, defense counsel ascertained from plaintiff that his supervisor is white and asked (1) do you get along well with your supervisor, (2) does your supervisor know that you have brought this race discrimination case against The Right Stuff, and (3) does your supervisor know that you have brought a race discrimination action against another section of the Justice Department? Ms. Esposito then contacted Mr. Glynn on the afternoon of 23 June 1997, immediately after plaintiff's deposition, to inform Mr. Glynn of information acquired during her discovery simply to damage plaintiff's career by suggesting that he is a trouble-making racial agitator. Esposito also told Mr. Glynn that she would serve him with a subpoena and take his deposition, after she ordered him to produce documents regarding any EEO actions by plaintiff and any information regarding plaintiff's general behavior in the workplace.

4. This invasion of privacy and discovery abuse is in violation of this Court's I May 1997 discovery order, which authorizes defense counsel only to take discovery from the plaintiff. This invasion of privacy and discovery abuse is also in violation of Restatement (Second) of Torts, which has been widely cited in New Jersey jurisprudence.

5. This discovery harassment of the plaintiff harkens back to the 1950s and 1960s, when civil rights plaintiffs found that bringing such cases led to still more discrimination from entire communities of white people mobilized to punish the trouble-maker.

6. Defense counsel's action almost immediately followed this Court's 19 June 1997 ruling that plaintiff is not permitted to contact Ms. Dorothy Miller's Right stuff dates --- people with whom Miller has absolutely no continuing relationships --- simply to find out when the dates took place. This privacy ruling was entered despite very strong evidence presented in plaintiff's 16 June 1997 Motion to Compel Discovery that Miller's deposition testimony of 10 June 1997 cannot reconciled with her affidavit of 26 April 1996. Defense counsel, on the other hand, has absolutely no reason to believe that deposing plaintiff's supervisor will have any value in this case outside of the intended intimidation effect on plaintiff. Indeed, Mr. Glynn referred Esposito to other people in the Justice Department for the Department's response to her demands.

7. If this sort of outrageous discovery war is simply business as usual in Jersey litigation, and this Court will not severely sanction Ms. Esposito for this conduct, plaintiff will initiate similar telephone calls to the supervisors of defendants Touchings and Krongard and witnesses Miller and Haan.

8. Additionally, defendants have violated this Court's 19 June 1997 ruling that plaintiff was to receive the Right Stuff bios identified therein before the 24 June 1997 deposition of defendant Touchings. Plaintiff requested this information from Ms. Esposito in writing on 13 June, 16 June, and 17 June 1997, each time advising defense counsel of plaintiff's need to have the information in advance of the Touchings deposition. Plaintiff again requested this information by telephone on 20 June 1997. Ms. Esposito assured plaintiff on 20 June 1997 that the documents would be produced before the Touchings deposition. Yet, Ms. Touchings admitted on 24 June that she did not even have her assistant look for the bios until 23 June 1997, and she

further admitted that her production of bios on 24 June 1997 was not a complete production. Indeed, Touchings could not even assure plaintiff that the bios of the two people mentioned by name had been included, nevermind the others identified as members whose bios were ordered by Ms. Miller. One of the six bios produced, however, is dated several months after the critical period of April 1995. If this person did not join the dating service until September 1995, then Miller could not have dated him or even ordered his bio until that time. This would prove one more instance of false testimony by Miller. Ms. Touchings is now looking for evidence that this is merely a replacement bio and does not identify the date on which this member joined the dating service's database. Plaintiff has advised Ms. Touchings that because her deposition date has passed she may now have to submit a separate sworn statement saying that the bio production is complete.

9. Plaintiff believes that defense counsel's extremely improper contact with Mr. Glynn in violation of the I May 1997 discovery order and defendant and/or defense counsel's violation of the 19 June 1997 privacy order jointly suggest that this Court has lost control of the defendants in this litigation. Severe sanctions are necessary to regain that control.

The forgoing statements are true. I am aware that if any of these statements are willfully false, I am subject to punishment.

/s/
Wagner D. Jackson, Jr.
Plaintiff pro se

DATED : 26 June 1997

Wagner D. Jackson, Jr.
2606 Finch Street
Silver Spring, MD 20902
(301) 649-6988 (home)

18 April 1997

FEDERAL EXPRESS
Honorable Norma Holloway Johnson
United States Courthouse Room 2315
333 Constitution Ave., N.W.
Washington, D.C. 20001

Re: Jackson v. The Right Stuff Case No. 1:97MS00092

Dear Judge Johnson:

This morning the parties had a loud and heated teleconference before Magistrate Hedges in which he said that he is uninterested in this Court's opinion on whether jurisdiction over the Miller deposition lies with this Court. Specifically, he said that he doesn't care about what that judge in Washington says. I attempted to argue that the absence of jurisdiction in his court makes his stay of the deposition on 21 April 1997 invalid, but his response was that while he may not have jurisdiction over the deposition he does have jurisdiction over me. If I go forward with the deposition in the face of his invalid stay, I can expect to be subjected to sanctions in New Jersey.

He also attempted to justify his granting of the stay without giving me an opportunity to be heard by pointing out that the document involved was an application for an order to show cause. This is nonsense. The very expression "order to show cause" suggests that the party so ordered must get an opportunity to show cause.

Defendants and Magistrate Hedges have achieved nullification of a subpoena from this Court without regard for this Court's jurisdiction and without plaintiff being given an opportunity to speak until the magistrate was obviously emotionally committed to his stay order. I ask for an opportunity to discuss this with you and opposing counsel at your nearest convenience.

Also, I have included copies of opposing
counsel's certification in support of the stay order, a copy of the order itself, and a copy of my certification in response to the granting of the stay order.

Thank you for your attention.

Respectfully submitted,

/s/
Wagner D. Jackson, Jr.

attachments

c. Hon. Ronald J. Hedges w/o attachments by Fed Ex
Francine Esposito, Esq. w/o attachments by Fed Ex

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JUDGE HEDGES: What is nature of your application?

MR. JACKSON: Ms. Miller's affidavit is very short, it consists of six paragraphs. The third paragraph says she was dating someone she had dated before me, and she used that as an excuse for not dating me. It's a civil rights case involving a dating service.

JUDGE HEDGES: Yes?

MR. JACKSON: She refuses to tell me the section of the World Bank in which this person works, and I am on my way to identifying him and possibly taking his deposition, depending on her testimony. Anyway, she refuses to answer questions about a matter which is at the heart of her testimony.

JUDGE HEDGES: Where is this deposition being conducted?

MR. JACKSON: In Washington, D.C.

JUDGE HEDGES: Was this done pursuant to a subpoena?

MR. JACKSON: Yes.

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JUDGE HEDGES: Then go to the court who issued the subpoena. They have jurisdiction over it. They can submit the matter to me.

(Judge Hedges ends the telephone conference.)

SHERRY ROE & ASSOC., INC.

GROTTA. GLASSMAN & HOFFMAN, P.A.
COUNSELLORS AT LAW
75 LIVINGSTON AVENUE
ROSELAND. NEW JERSEY 07068-1761
(973) 992-4800
TELECOPIER: (970) 992-9125

November 20, 1997

Wagner Jackson, Jr.
2606 Finch Street
Silver Spring, Maryland 20902

Re: **Wagner Jackson v. The Right Stuff**
CivilAction No. 97-555 (JCL)

Dear Mr. Jackson:

Now that discovery in this case is closed, it is obvious that defendants have not violated any law; that you are not entitled to recover any damages or any other form of relief from any of them. Accordingly, defendants demand that you withdraw your complaint with prejudice. Pursuant to Fed. R. Civ. P. 11, your failure to do so may result in the imposition of sanctions (including but not limited to attorneys, fees) upon you, which defendants intend to seek. Please be further advised that even if relief is not granted to defendants under Fed. R. Civ. P. 11, they will seek similar relief under the fee-shifting provisions of 42 U. S. C. §2000a-3 (a) ; and N.J.S.A. 10:5-27.1; under 28 U.S.C. §1927; under Fed. R. Civ. P. 56 (g) ; and/or under any other statute, rule or judicial decision under which they may have rights against you.

If you have any questions regarding the foregoing, contact me.

Very truly yours,
GROTTA, GLASSMAN & HOFFMAN, P.A.

/s/
FRANCINE ESPOSITO

out to decide issues which they need not address.[3]

Consequently, the 16 page opinion is essentially nothing but a review of contested material facts set against the standard for summary judgment,[4] and these 16 pages of

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[3] It is odd that the opinion completely ignores the contested legal issues in this case. One would think that the Court would first explicitly address whether any civil rights laws apply to defendants' behavior, and, if so, which particular civil rights statutes apply to the case. Perhaps the Court was simply in a hurry. But see infra at 9-14.

Also, it is strange that the Court ignores significant legal issues that it must address to even reach the factual analysis while wasting two pages addressing a phantom gender discrimination argument which plaintiff has never made and explicitly disavowed in the summary judgment opposition brief. Plaintiffs Brief Opposing Summary Judgment at 10, n.11. It appears that when the Court must decide an issue in favor of the plaintiff, it leaves the matter unaddressed and thereby decided sub silentio. On the other hand, when the Court can explicitly decide a matter against plaintiff, it does so whether plaintiff actually made the argument or not.

[4] This standard requires that all uncertainty be resolved in favor of the non-moving party, and there is uncertainty at the very least regarding every one of the significant contested findings of fact in the 7 May 1998 opinion.

"Where an issue as to material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate." Fed.R.Civ.P.56 (Advisory Committee Notes to 1963 Amendment).

The U.S. Supreme Court has also spoken on the matter: "Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of evidence, and the drawing fact-finding contain 14 major misstatements of fact, six minor misstatements, and two literally accurate but

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of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." (emphasis added.) Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

Specifically, the issues of motive and intent are not matters for summary judgment. See, gg., Conrad v. Delta Airlines, 494 F.2d 914, 918 (7th Cir. 1974); Leonard v. Cily of Frankfort, 752 F.2d 189, 194 (6th Cir. 1985). Consequently, summary judgment is disfavored in discrimination actions. See, e.g., Hillebrand v. M-Tron Industries, Inc., 827 F.2d 363 (8th Cir. 1987); Hayden v. First National Bank, 595 F.2d 994, 997 (5th Cir. 1979).

Despite the fact that defendants notified plaintiff of this fact and of its intent to seek costs and fees from him by letters dated November 20 and November 24, 1997, plaintiff failed to withdraw his Complaint. Plaintiff, as an experienced attorney, should have known that his claims were frivolous. Further, at the very least, plaintiff "should have known from pre-trial discovery that his claims were unreasonable, without foundation, and based purely upon speculation." Flowers v. Jefferson Hospital Ass'n-, 49 F.3d 391 (8th Cir. 1995) (district court did not abuse discretion in granting fees to prevailing defendant in §1981 claim). Accordingly, defendants should be granted costs and reasonable attorney's fees.

WAGNER D. JACKSON, JR.
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202-616-4222 (work)
301-649-6988 (home)
WDJ-3423

Plaintiff pro se

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Wagner D. Jackson, Jr.
Plaintiff,

Civil Action No. 97-555 (JCL)
NOTICE OF APPEAL

v.

The Right Stuff
Dawne Touchings
Paula Krongard
Defendants.

NOTICE OF APPEAL

Notice is hereby given that Wagner D. Jackson, Jr., plaintiff pro se in this action, hereby appeals to the United States Court of Appeals for the Third Circuit from the final judgment entered in this action on 7 May 1998.

/s/
Wagner D. Jackson, Jr.
Plaintiff pro se

DATED: 1 June 1998